

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES

**MAJESTIC TOWERS, INC.**  
**d/b/a WILSHIRE PLAZA HOTEL**

**and**

**Cases 31-CA-28135**  
**31-CA-28144**  
**31-CA-28196**  
**31-CA-28247**  
**31-CA-28248**  
**31-CA-28249**  
**31-CA-28250**  
**31-CA-28257**  
**31-CA-28487**  
**31-CA-28490**

**UNITE HERE LOCAL 11,**  
**UNITE HERE! INTERNATIONAL UNION**

**and**

**Case 31-CA-28143**

**THE LOS ANGELES HOTEL-RESTAURANT**  
**EMPLOYER-UNION WELFARE FUND, THE LOS**  
**ANGELES HOTEL-RESTAURANT EMPLOYER-UNION**  
**RETIREMENT FUND AND THE LEGAL FUND OF**  
**HOTEL AND RESTAURANT EMPLOYEES OF LOS ANGELES**

*Anne J. White, Esq., and Joanna F. Silverman, Esq., Los Angeles,*  
*CA, for the General Counsel.*

*Kristin L. Martin, Esq., San Francisco, CA, for the Union.*

*Henry M. Willis, Esq., Los Angeles, CA, for the Funds.*

*Joseph E. Herman, Esq., Los Angeles, CA for the Respondent.*

**DECISION**

**Statement of the Case**

**Gregory Z. Meyerson, Administrative Law Judge.** Pursuant to notice, I heard this case in Los Angeles, California, on October 15-19, 23-26, and November 26-28, 2007. Unite Here! Local 11, Unite Here! International Union (the Union) filed unfair labor practice charges in cases 31-CA-28135, 31-CA-28144, 31-CA-28196, 31-CA-28247, 31-CA-28248, 31-CA-28249, 31-CA-28250, 31-CA-28257, 31-CA-28487, and 31-CA-28490. The Los Angeles Hotel-

Restaurant Employer-Union Welfare Fund, the Los Angeles Hotel-Restaurant Employer-Union Retirement Fund, and the Legal Fund of Hotel and Restaurant Employees of Los Angeles (the Funds) filed an unfair labor practice charge in case 31-CA-28143. Based on those charges, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued two separate complaints on June 26 and November 6, 2007, respectively.<sup>1</sup> The two complaints collectively allege that Majestic Towers, Inc. d/b/a Wilshire Plaza Hotel (the Employer, the Respondent, or the Hotel) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed timely answers to both complaints denying the commission of the alleged unfair labor practices.<sup>2</sup> On November 26, 2007, over counsel for the Respondent's objection, I granted counsel for the General Counsel's motion to consolidate the charges contained in the two complaints for trial before me.<sup>3</sup> Accordingly, I heard evidence at the trial regarding all the charges in the above captioned cases.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs.<sup>4</sup> Based upon the record, my consideration of the briefs filed by counsels for the General Counsel, the Respondent, and the Funds,<sup>5</sup> and my observation of the demeanor of the witnesses, I now make the following findings of fact and conclusions of law.<sup>6</sup>

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<sup>1</sup> The two complaints set forth the various dates on which the respective charges were filed. The Respondent's answers to the complaints admit the alleged filing dates.

<sup>2</sup> All pleadings reflect the two complaints and the Respondent's respective answers as those documents were finally amended.

<sup>3</sup> The charges were all alleged in the earlier complaint, with the exception of those charges in cases 31-CA-28487 and 31-CA-28490, which were alleged in the latter complaint. I consolidated all these cases for trial as they involved the same parties, factually and legally related events, similar alleged violations of the Act, in the interest of judicial economy, and because I concluded to do so would not prejudice the Respondent.

<sup>4</sup> At the time of the hearing, counsel of record for the Union was Jasleen Kohli, who appeared and participated at the hearing. However, subsequently, Ms. Kohli withdrew as counsel, to be replaced by Kristin L. Martin. Further, at the time of the hearing, counsel of record for the Respondent was Andrew B. Kaplan and Jeffrey Mayes, who appeared and participated at the hearing. Subsequently, Joseph E. Herman was substituted as counsel of record.

<sup>5</sup> Following the receipt of briefs from the parties, counsel for the General Counsel filed with the undersigned a Motion to File Reply Briefs. As the Board's Rules and Regulations do not provide for the filing of reply briefs with the administrative law judge, and because the filing of such reply briefs are unnecessary in this case, I hereby deny counsel for the General Counsel's motion.

<sup>6</sup> The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 NLRB 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

## **Findings of Fact**

### **I. Jurisdiction**

5 All parties stipulated and I find that at all times material, the Respondent, a California corporation with an office and place of business at 3515 Wilshire Boulevard, Los Angeles, California, has managed and operated a hotel facility at that location, which provides food and lodging to the public. Further, that during the calendar year ending December 31, 2006, the Respondent, in conducting its business operations, derived gross revenues in excess of  
10 \$500,000; and that during the same period of time the Respondent purchased and received at its facility, products, goods and materials valued in excess of \$5,000, directly from points located outside the State of California. (Jt. Ex. 1, Stipulation of Facts.)

15 Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### **II. Labor Organization**

20 The complaints allege, the answers admit, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### **III. Stipulated Background Facts**

25 All parties stipulated to the following set of facts, which stipulation was received into evidence as Joint Exhibit Number 1:

30 Prior to September 21, 2005, L A Koreana, Inc. (Koreana), owned and operated a hotel located at 3515 Wilshire Boulevard, Los Angeles, California, which conducted business as the Radisson Wilshire Plaza Hotel and which provided food and lodging to guests. On or about September 21, 2005, the Lee 2003 Family Trust purchased the land and building on and in which Koreana did business as the Radisson Wilshire Plaza Hotel. Since on or about September 21, 2005, until an unknown date, the Respondent also conducted business as the Radisson Wilshire Plaza Hotel.

35 Since an unknown date, the Respondent now does business as the Wilshire Plaza Hotel (the Respondent's facility), on the same land and in the same building in which Respondent previously did business as the Radisson Wilshire Plaza Hotel. On or about September 21, 2005, the Lee 2003 Family Trust entered into a lease agreement with the Respondent, whereby  
40 the Respondent leased the building and the land described above. Since then, the Respondent has continued to operate the business in basically unchanged form. The Respondent employed as a majority of its employees individuals who were previously employed by Koreana.

45 At all times material herein, the Respondent has managed and operated the Respondent's facility, which provides food and lodging to the public. Based on the operations described above, the Respondent has continued as the employing entity and is a successor to Koreana.

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Certain employees of the Respondent constitute a unit (the Unit) appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.<sup>7</sup>

At all material times from April 16, 2004, until about September 20, 2005, the Union claims that it was the designated exclusive collective-bargaining representative of the Unit employed by Koreana and the Union was recognized as the representative by Koreana. This recognition was embodied in the collective-bargaining agreement (the Agreement) effective for the period from April 16, 2004, through April 16, 2006 (Jt. Ex. 2.). At all times from April 16, 2004, until about September 20, 2005, based upon the Union's representation, and based on Section 9(a) of the Act, the Union was the exclusive collective-bargaining representative of the Unit employed by Koreana.

About September 21, 2005, the Respondent assumed the Agreement. At all times since about September 21, 2005, the Union has been the designated exclusive collective-bargaining representative of the Unit employed by the Respondent and the Union has been recognized as that representative by the Respondent. This recognition has been embodied in the Agreement (Jt. Ex. 2.), which was effective for the period from April 16, 2004, through April 12, 2006, and extended through December 24, 2006. At all times since about September 21, 2005, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit employed by the Respondent.

The stipulation contains other facts, agreed to by the parties and, thus, not in dispute, which facts will be set forth later in this decision, as the evidence and the respective positions of the parties are discussed.

#### **IV. Alleged Unfair Labor Practices**

##### **1. An Overview/Position of the Parties**

In its two complaints, the General Counsel has alleged that the Respondent has committed a very significant number of unfair labor practices. Without explicitly saying so, counsel for the General Counsel is contending that the Respondent has engaged in an organized effort to have the Union removed as the collective-bargaining representative of its employees. According to the General Counsel, this effort began with the commission of numerous unfair labor practices by the Respondent before and during the period of time that the parties were engaged in contract negotiations. It is alleged that these unfair labor practices had a pervasive and adverse effect on the bargaining process, which casual connection to the bargaining negotiations resulted in the parties' failure to reach an agreement on a successor contract. It is the Government's position that in the context of these significant unremedied

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<sup>7</sup> Included: All full-time and regular part-time cooks, pantry employees, dishwashers, deli attendants, waiters, bussers, room service employees, banquet employees, bartenders, restaurant cashiers, stewarding department employees, housekeeping department employees, laundry attendants, front office attendants, PBX attendants, reservation agents, bell attendants, and others listed in Schedule A in the collective-bargaining agreement between the Respondent and the Union effective for the period April 16, 2004, through April 16, 2006, and extended through December 24, 2006, employed at the Respondent's Wilshire Plaza facility in Los Angeles, California.

Excluded: Office clerical employees, all other employees, guards and supervisors as defined in the Act.

unfair labor practices, no valid impasse in negotiations could be reached. Therefore, for that reason alone, the General Counsel contends that the Respondent's declaration of impasse and institution of its last contract offer constituted an unlawful implementation of unilateral changes.

5 However, as an alternate and second basis for concluding that the Respondent's institution of its last contract offer was an unlawful implementation of unilateral changes, the General Counsel contends that the Respondent and the Union had not reached a genuine impasse in their bargaining negotiations. Thus, even without the effect of the alleged unfair labor practices on the negotiations, the parties allegedly still had the capacity to compromise and were not at the end point where all further negotiations would constitute an exercise in futility. The General Counsel argues that the Union had made significant concessions in its bargaining position, and had indicated to the Respondent a willingness to make further concessions. Such an attitude in negotiations allegedly is not indicative of impasse.

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15 Finally, counsel for the General Counsel contends that following the implementation of its last contract offer, the Respondent continued with its effort to eliminate the Union by committing numerous unfair labor practices. These unfair labor practices allegedly demonstrated the Respondent's animus towards the Union, its intent to undermine the Union's authority, and its clear motivation to rid itself of the Union as the collective-bargaining representative of its employees.

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25 Counsel for the Funds indicated in his post-hearing brief his agreement with the General Counsel's theory of the case. Further, while counsel for the Union did not file a post-hearing brief, the indication from her comments at trial were that she also agreed with the positions taken by the General Counsel.

30 Counsel for the Respondent does not deny that certain pre-impasse unfair labor practices occurred. However, counsel argues that any such unfair labor practices were isolated incidents, occurred away from the bargaining table, and were committed primarily by persons who acted without the direction or supervision of senior management. Most significantly, counsel contends that any such unfair labor practices were not related to the conduct at the negotiations, and did not influence or affect the result that a legitimate impasse was reached between the negotiating parties. It is alleged that such a lawful impasse allowed the Respondent to implement its "last, best, and final offer." Finally, the Respondent's attorneys deny that any post-impasse unfair labor practices were committed by the Respondent's agents.

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40 It is the position of counsel for the Respondent that all the Respondent's actions taken and proposals made at the negotiation table were in good faith, and were driven solely by its dire financial situation. Allegedly, the Respondent was losing a significant amount of money, and in order to survive financially required a collective-bargaining agreement that resulted in large cost savings for the Respondent. This was the Respondent's theme throughout the negotiation process, which included 10 face to face negotiation sessions. The Respondent used every opportunity to remind the Union's negotiators that it would need concessions from the Union in order to reach agreement on a new contract. However, according to counsel for the Respondent, the Union never offered concessions, but, rather, always insisted on contract terms and conditions that cost the Respondent more than it was currently paying. Upon reaching a point in negotiations where compromise no longer appeared possible, the Respondent declared impasse and instituted portions of its last, best, and final offer. The Respondent denies any intention or interest in ridding itself of the Union.

It should be noted that the chief negotiator for the Union was Tom Walsh, the Union's secretary-treasurer. The Respondent was represented at the negotiations by its attorneys Jeffrey Mayes and Andy Kaplan. The principal negotiator for the Respondent was Kaplan, who also testified at the hearing on behalf of his client.<sup>8</sup>

What follows is a discussion and analysis of the unfair labor practices alleged in the two complaints. For the most part, I will attempt to address these issues in chronological order, with three natural divisions: pre-impasse conduct, negotiation/impasse, and post-impasse conduct.

## 2. Pre-Impasse Conduct

### A. Delay in Remitting Dues and Related Information

As noted above, the collective-bargaining agreement (the Agreement) between the Union and the Respondent was set to expire on April 16, 2006.<sup>9</sup> Andy Kaplan (Kaplan), counsel for the Respondent, testified that he contacted the Union sometime before that date in an effort to get negotiations started before the expiration of the Agreement. On about April 15, representatives of the Union and the Respondent met at the offices of a Los Angeles, California City Councilman. The parties discussed the nearness of the Agreement's expiration date, and they agreed upon an extension of the Agreement. While it is unclear for how long the Agreement was initially extended, ultimately it was extended through December 24. According to Kaplan, he informed all present that the Employer was "anxious" to begin negotiations. However, for whatever reason, actual contract negotiations did not begin for some time. In the interim, the Respondent took a number of actions, which counsel for the Respondent does not deny were taken unilaterally and in violation of various provisions of the Agreement.

The parties stipulated that "prior to December 24, 2006, the Respondent was required under Section 2(J) of the Agreement to deduct monthly union dues and to remit these dues, along with related union dues information, to the Union." (Jt. Ex. 1, p. 8, par. 10(a).) In that stipulation the Respondent admitted that it did not remit the August dues until October 13, 2006; that it did not remit the September dues until November 29, 2006; and that it did not remit dues for the months of October and November 2006 until May 9, 2007. (Jt. Ex. 1, p.8-9, par. 10 (b-d); Jt. Ex. 5-7.)

Further, the parties stipulated that prior to December 24, 2006, Section 2(J) of the Agreement required the Respondent to provide the Union with "information concerning the Respondent's deduction of monthly Union dues, including the name of each employee for whom dues have been deducted and the amount of dues deducted." (Jt. Ex. 1, p. 9, par. 10(e).) Also, the parties stipulated that these dues and the reporting of related information was "necessary for, and relevant to, the Charging Party Union's performance of its duties as the exclusive collective-bargaining representative of the Unit." (Jt. Ex. 1, p. 9, par. 10(f).) In that stipulation the Respondent admitted that it failed to furnish the Union with the monthly dues information for August 2006 until about March 22, 2007; that it failed to furnish the Union with monthly dues information for the month of September 2006 until December 13, 2007<sup>10</sup>; and that it failed to

<sup>8</sup> Before testifying, I advised Kaplan that his testimony would be subject to credibility determinations just as it would be for any witnesses. In response, he indicated that such was as it should be.

<sup>9</sup> All dates are in 2006 unless otherwise indicated.

<sup>10</sup> This appears to be a typographical error, which should read December 13, 2006.

furnish the Union with monthly dues information for the months of October and November 2006 until April 10, 2007. (Jt. Ex. 1, p. 9-10, par. 10(g-i); Jt. Ex. 8-11.)

Paragraph 7 of the first complaint alleges that the Respondent violated Section 8(a)(5) of the Act by delaying in remitting employee union dues deductions and related reporting information. The undisputed facts, as set forth in the stipulation, establish this violation. "It is well established that an employer violates Section 8(a)(5) by ceasing to deduct and remit dues in derogation of an existing contract." *Hearst Corp. Capitol Newspaper Div.*, 343 NLRB 689, 693 (2004); citing *Shen-Mar Food Prod.*, 221 NLRB 1329 (1976). Further, "it is well settled that each monthly failure to deduct and remit dues to the Union [is] a separate violation of the Act." *MBC Headwear, Inc.*, 315 NLRB 424, 428 (1994), citing *Farmingdale Iron Works*, 249 NLRB 98 (1980). It is long standing Board law that an employer's refusal to properly "tender dues withheld from employee paychecks under a valid dues-checkoff authorization constitutes a unilateral change in terms and conditions of employment in violation of Section 8(a)(5) of the Act." *Merryweather Optical Co.*, 240 NLRB 1213, 1215 (1979); *Western Block Co.*, 229 NLRB 482 (1977); *Cavaler Spring Co.*, 193 NLRB 829 (1971).

As the stipulation shows, the Respondent deducted dues from the unit employees' paychecks, as provided for in the Agreement, and then admittedly failed to remit those dues to the Union in a timely manner. Similarly, the Respondent failed to timely furnish the Union with a list each month of those employees paying dues. Therefore, the General Counsel has established that the Respondent violated Section 8(a)(5) of the Act by delaying in remitting union dues owed from August through November 2006, and by unreasonably delaying in submitting to the Union a monthly accounting of the unit employees making those payments, as alleged in paragraph 7 of the first complaint.

#### **B. Failure to Contribute to Various Funds and Submit Related Reports**

Section 8(E) of the Agreement requires the Respondent to make payments and submit reports to the Health and Welfare and Retirement Funds (the Funds). (Jt. Ex. 1, p.10-11, par. 11(a-d).) In the stipulation, the parties state that, "until at least January 31, 2007, Section 8(E) of the Agreement...required the Respondent to provide a monthly Funds' contribution report to the Charging Party Funds simultaneously with the Respondent's monthly contribution to the Charging Party Funds." The Respondent admitted that it failed to make the required contributions to the Funds as described in Section 8(E) of the Agreement from August through December 2006, and, that as of the date of the stipulation, those contributions had still not been made to the Funds.<sup>11</sup> Further, in the stipulation the Respondent admitted that from September through December 2006 it failed to furnish the Funds with monthly contribution reports for that period. (Jt. Ex. 1, p. 10-11, par. 11(a-d).)

The Respondent admitted in the stipulation that, prior to February 1, 2007, the contributions and reporting information that the Respondent was required to provide to the Charging Party Funds was "necessary for, and relevant to, the Charging Party Union's performance of its duties as the exclusive collective-bargaining representative of the Unit." (Jt. Ex. 1, p. 11, par. 11(d).)

<sup>11</sup> According to the testimony of Rolly Throckmorton, the administrative manager for the Funds, the Respondent made one contribution to the Funds for the month of January 2007 as part of a settlement agreement reached between the Funds and the Respondent. (Also see G.C. Ex. 20.)

According to the testimony of Rolly Throckmorton, the administrative manager of the Funds, the Respondent's "failure to submit contributions to the Welfare Fund means that employees that had worked the hours required for eligibility would not be entitled to receive eligibility because the Welfare Fund rules require that, in order for their work hours to go toward eligibility, the required contributions must be paid." As an example, Throckmorton testified that a failure by the Respondent to make contributions on behalf of the employees into the Funds would result in effected employees "los[ing] their entitlement to hospital, medical, dental, and life insurance benefits... [and] the Legal Fund benefits to which they would, otherwise, be entitled."

Paragraph 8 of the first complaint alleges that the Respondent violated Section 8(a)(5) of the Act by failing to make contractually required contributions on behalf of unit employees into the Funds and by failing to submit related reports. The undisputed facts set forth in the stipulation establish this violation. "It is well established Board law that an employer's refusal to make payments to an insurance or trust fund established by a collective-bargaining agreement... constitutes a unilateral change in terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act." *Merryweather Optical Co., supra*, at 1215.

It has been held by the Board that "the unilateral decision to discontinue making benefit fund contributions, like the failure to make periodic wage increases, constitutes a violation of Section 8(a)(5) of the Act." *Farmingdale Iron Works, Inc., supra*. There is no question that the contractual payment by an employer of monies into a fund to provide medical insurance for a covered employee and his/her family is an extremely important term and condition of employment. To some employees such a benefit may be more significant even than the wage compensation.

The Respondent's admitted failure to make contributions to the Funds for the period of August through December and to submit related reports from September through December 2006 goes to the heart of the collective-bargaining relationship between the Employer and the Union and constitutes a violation of Section 8(a)(5) of the Act, as alleged in paragraph 8 of the first complaint.<sup>12</sup>

### **C. Refusal to Process Grievance and Furnish Requested Information**

The Agreement between the Union and Respondent contains a grievance procedure for all "questions, grievances or controversies pertaining to the application or interpretation of [the] Agreement." (Jt. Ex. 1, p.11, par. 12(a).) It is uncontested that the Union was concerned about the failure of the Respondent to make contractually required payments to the various Funds. The matter was discussed between Andy Kaplan and union representatives Oscar Salazar and Tom Walsh over the bargaining table during negotiations. In addition, on September 25, 2006, Salazar sent by fax to Alex Delgado, alleged to be the Employer's general manager at the time, and Chamroeun Trinidad, the human resource/payroll coordinator and a stipulated agent and supervisor, a letter indicating that the Union was grieving the non-payments to the Funds on behalf of the effected unit employees. (Res. Ex. 6, and G.C. Ex. 14.) In order to prepare to argue the grievance, the Union requested the following information: "1. A spreadsheet with all the names of the Union employees, showing the hours worked and the dollar amount applied for each employee to Health and Welfare for the last six months. 2. Proof of payments to Health

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<sup>12</sup> It should be noted that counsel for the General Counsel's claim that this violation of the Act continues to the present time as a consequence of the Respondent's unilateral implementation of its last contract proposal will be addressed by the undersigned later in this decision.



and Welfare for the last six months.” The parties have stipulated that the requested information was necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of the Unit. (Jt. Ex. 1, p. 11, par. 12(b).)

5 Paragraph 9 of the first complaint alleges that since September 25, 2006, the Respondent has failed and refused to provide the Union with the information it requested in connection with the non-payment to the Funds, and failed and refused to process the grievance filed by the Union over this non-payment, which refusal is alleged in paragraph 31 to constitute a violation of Section 8(a)(5) of the Act. Andy Kaplan did not deny that no documents were  
10 forthcoming in response to the request. However, he contends that he had an agreement with union representative Fred Pascual to take no further action on the grievance until the parties had an opportunity to discuss the non-payment issue at the bargaining table.

Kaplan acknowledges receiving a copy of the Salazar letter dated September 25 from  
15 Alex Delgado. He testified that he called Pascual and discussed the grievance with him over the telephone. Kaplan claims that Pascual agreed with him that the issue of non-payment to the Funds “would most certainly be dealt with at the bargaining table and we agreed, therefore, that the Hotel not take any further action with respect to the grievance, unless and until Mr. Pascual would call me and tell me to the contrary.” According to Kaplan, subsequently he has never  
20 been contacted by anyone with the Union about this grievance. Kaplan testified that he made a contemporaneous memorialization of his conversation with Pascual by writing on his copy of the September 25 letter from Salazar to Delgado the following: “Spoke to Fred Pascual-9-25, Union not pursuing this unless he calls me.” (Res. Ex. 6.)

25 Fred Pascual was at the time of the events in question the director of hotels for the Union. I found his testimony regarding the grievance issue somewhat contradictory. He was shown a copy of the September 25 letter from Salazar to Trinidad (G.C. Ex. 14.), and he indicated that he was familiar with the document, having seen it previously. Initially, when examined by counsel for the General Counsel, Pascual testified clearly that he had never  
30 indicated to any representative of the hotel, including Andy Kaplan, in any fashion that the Union did not wish to pursue the grievance, or was withdrawing the grievance. However, on cross-examination Pascual was less certain, forced to admit that he presently had no recollection of talking with Kaplan about any specific grievance the Union had filed against the Employer. He could simply not remember any conversation with Kaplan specifically regarding the grievance  
35 about non-payment to the Funds, or about any other particular grievance.

While Kaplan’s testimony, on the surface, certainly seems more reliable than that of Pascual, it does not negate one final written communication. On October 2, a week after the alleged conversation between Pascual and Kaplan, Pascual faxed a letter to Trinidad. The  
40 subject of the letter was “Non payment of Health & Welfare and Retirement Funds.” In the letter Pascual writes, “Local 11 desires to take to arbitration the above-mentioned grievance. Please contact me at your earliest convenience to select an arbitrator to hear this matter.” Further, it appears from the fax receipt that the Respondent received the communication. (G.C. Ex. 19.)

45 It is simply illogical that a week earlier Pascual agreed to take no further action on the grievance until the parties had discussed the matter over the bargaining table, and then sent the Employer a letter seeking to select an arbitrator to hear the dispute. Even assuming Pascual had made such a promise to Kaplan, by October 2 he had clearly changed his mind and was indicating the Union’s desire to go forward on the grievance. Finally, it is very significant that  
50 Trinidad, the recipient of the last communication, was not called as a witness by the

Respondent. The Respondent's counsel offered no reason for the failure of Trinidad to testify, and I am left to draw an adverse inference from her non-appearance.<sup>13</sup> I will draw such an inference and conclude, based on the totality of the evidence, that by at least October 2 it should have been clear to the Respondent that the Union wished to have the grievance processed and required the written information, which had been previously requested of the Respondent in the letter of September 25.

In a recent case, *Disneyland Park and Disney's California Adventure*, 350 NLRB No. 88 (September 13, 2007), the Board recited certain well established legal principles regarding an employer's obligation to provide requested information to a union representing the employer's employees. As the Board said, "An employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective bargaining representative." The Board cited to a number of Supreme Court decisions including *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co., v. NLRB*, 440 U.S. 301 (1979). Further, the Board added that, "This includes [information needed for] the decision to file or process grievances," citing to *Beth Abraham Health Services*, 332 NLRB 1234 (2000).

As noted earlier, the parties stipulated that the information requested by the Union in its letter of September 25, namely a spreadsheet with all the names of the union employees, showing the hours worked and the dollar amount applied for each employee to Health and Welfare for the last six months and proof of payments to Health and Welfare for the last six months, was necessary for, and relevant to, the Union's performance of its collective-bargaining duties. Since there is no dispute that these documents were necessary and relevant, I find that the Respondent's failure to produce them constitutes a violation of Section 8(a)(5) of the Act, as alleged in paragraphs 9 and 31 of the first complaint.

Further, under Board law, "it is well settled that an employer is obligated...to meet with the employees' bargaining representative to discuss its grievances and to do so in a sincere effort to resolve them." *Contract Carriers' Corp.*, 339 NLRB 851, 852 (2003), citing *Hoffman Air & Filtration Sys.*, 316 NLRB 353, 356 (1995). Since being advised by the Union in its correspondence of September 25 and again in its correspondence of October 2 of its desire to grieve, and if necessary arbitrate, the non-payment to the Funds, the Respondent has made no effort to process the grievance. To the contrary, it has obstructed the process by failing to produce the written information requested by the Union and necessary for it to prepare to argue

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<sup>13</sup> While the record does not conclusively establish that Trinidad herself actually received the October 2 communication or was even still employed by the Respondent on that date, it appears highly likely as Salazar testified that a day or two after sending Trinidad the letter of September 25, he called Trinidad and discussed the grievance with her. According to Salazar, Trinidad acknowledged receipt of the fax, but indicated that she was presently unavailable to meet with him and discuss the grievance at length. As the October 2 letter from Pascual appears to have been faxed to the same fax number as the earlier communication, and as there is a fax receipt for that communication, I will assume that Trinidad received it as well. (G.C. Ex. 19.)

the merits of the grievance. Accordingly, I find that the Respondent's failure and refusal to process the grievance is a violation of Section 8(a)(5) of the Act, as alleged in paragraphs 9 and 31 of the first complaint.<sup>14</sup>

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#### D. Locker Searches

It is alleged in paragraphs 16, 31, and 32 of the first complaint that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by its unilateral implementation of a new locker search policy and its subsequent discriminatory search of the lockers of four employees. The four employees involved, Griselda Campos, Susana Serrano, Maria Carrillo, and Ofelia Calderon, were employed by the Respondent as housekeepers and all testified at the hearing.

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In the joint stipulation, the Respondent admitted that prior to September 27, 2006, it did not have a policy governing random employee locker inspections. In the stipulation the Respondent acknowledged that on September 27, Chamroeun Trinidad (at the time the human resources/payroll coordinator and an admitted supervisor and agent) issued a memorandum to employees regarding the Respondent's policy on "Random Selection for Locker Inspection." (Jt. Ex. 15.) Further, the Respondent admitted that on September 28, Trinidad implemented the new policy concerning random employee locker inspections by notifying employees Campos, Serrano, Carrillo, and Ofelia that they were selected for the locker inspections. (Jt. Ex. I, p. 14-15, par. 19 (a)-(c).)

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Campos testified that in late September a number of employees learned that they had lost their medical insurance coverage. They only learned this when they sought medical care and were denied treatment as no longer being eligible under the terms of the medical plan funded in part from contributions by the Respondent through the Employer-Union Welfare Funds. As previously noted, I have concluded that the Respondent's action in unilaterally ceasing to make contractually required contributions to the Funds constituted a violation of Section 8(a)(5) of the Act. Apparently as a result of the Respondent having ceased making fund contributions on behalf of the unit employees, those employees were losing their health insurance benefits. Campos, who was at the time the union steward, indicated that the employees were very upset upon learning that they no longer had medical insurance. A number of them decided to confront Chamroeun Trinidad over this matter.

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On September 27 at about 2 pm a group of employees formed at Trinidad's office. Campos estimated the number of employees at 25-30. According to Campos, she and Susan Serrano acted as spokespersons for the group. Maria Carrillo was also part of the group. Campos informed Trinidad that the employees wanted to talk with her about their medical insurance, and approximately 15 employees were allowed into the office.

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Campos asked Trinidad why the Employer had stopped paying for their medical insurance. Serrano testified that she explained to Trinidad the serious impact the loss of insurance was having on the employees. She gave Trinidad the examples of a female employee with breast cancer, of others with high blood pressure and diabetes, and of her personal problem with kidney stones. Serrano and Campos insisted that the employees needed their medical insurance and wanted it restored. Trinidad responded that she had been unaware

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<sup>14</sup> There is no dispute that the Union filed the grievance while the Agreement was in effect, and, in any event, Board Law is clear that the contractual grievance procedure survives the expiration of the contract. *Southwest Portland Cement Co.*, 289 NLRB 1264, 1279 (1988), citing *Shipbuilders v. NLRB*, 320 F.2d 615, 619-620 (3<sup>rd</sup> Cir. 1963).

that employees were being denied medical treatment, and she would find out what the problem was with the medical insurance. She promised to respond to the employees' concerns within three days.

5           The following day, September 28, Campos, Serrano, Carrillo, and Ofelia Calderon were summoned to Trinidad's office. Of the four, Calderon was the only one who had not participated in the protest the day before regarding their loss of medical insurance. In any event, Trinidad gave at least two of them, Campos and Serrano, a copy of her memo regarding "Random Selection For Locker Inspection." (Jt. Ex. 15.) They were apparently all told that they had been  
10 randomly selected, and that each was going to have her locker searched to see if weapons or drugs were present.

          Trinidad, along with a security guard, then escorted the four employees to their lockers, which were located inside the female employees' bathroom. Each locker was then individually  
15 searched by Trinidad in the presence of the security guard and the one employee whose locker was being searched. No guns or drugs were found in any of the lockers, and as the search of each locker was completed, that employee was released to return to work.

          Trinidad's memo of September 27 is signed by her as the "H.R./Payroll Coordinator." In pertinent part it reads, "We are going to conduct random locker inspections. The purpose of this  
20 exercise is to deter drugs, and weapons from entering the property. You have been chosen to do a random locker inspection." It appears that none of the four employees had ever previously had any incidents at work involving drugs or weapons. Nothing improper was found in their lockers, and no discipline resulted from the searches.

          As noted, the Respondent stipulated that prior to the September 27 memo, the Respondent had no policy regarding random locker searches. As Trinidad did not testify at the hearing, the testimony of the four employees involved in the search remains un rebutted. While  
25 not denying that the memo issued or that the searches were conducted, counsel for the Respondent seems to suggest in his post-hearing brief that Trinidad's actions were taken without the knowledge or consent of upper management. Further, counsel argues that the searches were random and not connected to or in retaliation for the union or protected concerted activity of the employees selected for the search. Counsel claims that of the four  
30 employees selected, two were not involved in the protest in Trinidad's office, and that the only connection to that protest was the proximity in time to the locker searches.  
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          To begin with, counsel is wrong about the number of searched employees who attended the protest the day before. From their testimony, it seems that only Calderon was uninvolved in the protest. Further, I am at a loss to understand what difference it makes whether upper  
40 management was aware of Trinidad's actions or not. The Respondent has admitted that Trinidad was its agent and supervisor. Certainly her position as H.R./Payroll Coordinator was an important one, especially as it related to the unit employees with whom her contacts would likely have been common, and significant to those employees involved.

45           Union representative Salazar testified that he was never given the opportunity by the Respondent to bargain over a new locker search policy, nor did the Respondent ever advise him that it was implementing such a new policy.<sup>15</sup> The Respondent offered no evidence to

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50           <sup>15</sup> Salazar was a former employee of the Hotel, and he was the union representative most familiar to the Respondent's managers, as he was frequently on the property to administer and police the Agreement.

rebut Salazar, or to establish that some other union representative was afforded such an opportunity or was advised of the search policy prior to its implementation. Thus, the evidence clearly establishes that the Respondent failed to bargain with the Union before unilaterally implementing its new locker search policy, and, thereafter, searching the lockers of Campos, Serrano, Carrillo, and Calderon. Accordingly, by those actions the Respondent violated Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 16 and 31 of the first complaint. *ATC/Vancom of California*, 338 NLRB 1166 (2003).

Further, I believe that the Respondent took the action of issuing the "Random Selection For Locker Inspection" memo and subsequent search of the four employees' lockers in retaliation for the employees' union and protected concerted activity in protesting the elimination of their medical insurance. In assessing whether Respondent's action violated Section 8(a)(3) of the Act, it is necessary to analyze the situation under the shifting analysis burden of *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied, 455 U.S. 989 (1982).

In *Wright Line*, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

The Board in *Tracker Marine, L.L.C.*, 337 NLRB 644 (2002), affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

The Respondent does not dispute the obvious fact that the protest engaged in by 25-30 employees outside of Trinidad's office on September 27 constituted both union and protected concerted activity. The employees were highly upset about the Respondent's unilateral action in discontinuing payments to the Funds. That caused the medical insurance provider to cease providing medical care to the unit employees. The employee confrontation with Trinidad was intended to force the Respondent to resume its contractually required payment to the Funds. Of the four employees whose lockers were searched the following day, three had been present at the protest. Even more significant was the fact that two of those employees, Campos and Serrano, had acted as spokespersons for the group in directing confronting Trinidad and insisting that she do something to have their medical insurance restored. Obviously, there can be no question that the Respondent, through Trinidad, was aware of this protected activity, as she herself had been confronted by it.

Similarly, there can be no doubt that the four employees suffered an adverse employment action. They received the September 27 "Random Selection For Locker Inspection" memo from Trinidad, either in writing, orally, or both. Their receipt of the memo occurred just prior to their lockers being searched on September 28. Presumably, the search of their lockers, ostensibly for drugs and weapons, could have led to disciplinary action, and, certainly, a refusal to permit such a search could have resulted in a charge of insubordination. The Respondent does not even bother to deny that a search of their lockers was adverse to the interests of the four employees.

The only attempt made by the Respondent to rebut this charge comes from counsel's post-hearing brief where it is argued that there is no connection or nexus between the protected conduct engaged in by these employees and the subsequent search of their lockers, except the "proximity in time." Of course, the proximity in time of these two events is very telling. It defies credulity to imagine that this was mere coincidence. On September 27 three of the four employees in question gathered with others to confront Trinidad, two of them acting as the principal spokespersons. That same day Trinidad drafts the locker memo, and the following day the memo is given to the four employees and their lockers are searched. In my view, it is the height of naivety to believe that the selection of these employees was simply "random." Further, as noted earlier, Trinidad did not testify at the hearing, and I have drawn an adverse inference from her absence.

While there is no direct evidence of union animus on the part of Trinidad, the circumstantial evidence set forth above strongly suggests such. See *Fresh Organics, Inc., d/b/a Real Foods Co.*, 350 NLRB No. 32, \*4, fn. 17 (2007). Also, as will be apparent by the conclusion of this decision, there are many examples of union animus displayed by and attributed directly to other supervisors and agents of the Respondent, including those at the highest levels of management.

Accordingly, based on the above, counsel for the General Counsel has met her burden of establishing that the Respondent's actions in issuing the "Random Selection For Locker Inspection" memo and in searching the lockers of the four employees were motivated, at least in part, because of the union and protected concerted activity engaged in by the employees.<sup>16</sup> The burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. However, the Respondent offered no evidence in its defense, with Trinidad failing to testify. Obviously, therefore, the Respondent has failed to meet this burden.

Based on the above, I conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act by promulgating its unlawful locker search memo of September 27 and in searching the lockers of employees Campos, Serrano, Carrillo, and Calderon on September 28, as alleged in paragraphs 16 and 32 of the first complaint. See *Mays Electric Co.*, 343 NLRB 128 (2004).

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<sup>16</sup> While Ofelia Calderon did not participate in the protest at Trinidad's office, her inclusion in the group of four whose lockers were to be searched was likely merely intended to deflect attention away from the other three employees who engaged in the protected conduct, two of whom were principal spokespersons.

### E. Interrogation of William Carranza

Paragraphs 21 and 33 of the first complaint allege that in late November or early December of 2006, Leo Lee interrogated and threatened to terminate employees because of their union activity. As was apparent at the hearing, William Carranza, a deli server at the hotel, was the employee allegedly interrogated and threatened. The stipulation between the parties names Leo Lee as the Respondent's president, and further states that he is an agent and supervisor. In his testimony, Lee referred to himself as the Respondent's "CEO." In any event, he is clearly the Respondent's highest ranking manager.

The complaints allege that the Respondent, through Lee, committed various violations of the Act. Those allegations are denied in the Respondent's answers. It is, therefore, necessary for me to evaluate Lee's credibility, as he generally denied the conduct attributed to him by various employees who testified, including Carranza. In this regard, I found much of Lee's testimony unbelievable. He testified in a very cryptic manner. His answers to questions were frequently short and abrupt, without detail or explanation. He was nervous, excessively so for a person of his status as the CEO of a significant business enterprise. He indicated a lack of knowledge as to what was happening at the hotel of which he was the highest ranking manager. His testimony, especially during cross-examination, was filled with general responses, denials, or uncertainty regarding matters, the specifics of which he certainly should have known in his position. If his testimony was to be believed, there existed a group of supervisors who were acting unlawfully on their own authority, without Lee's knowledge. This I find highly unlikely. Frankly, he testified as if he had something to hide.

As I did not find Lee to be a credible witness, I accepted the contrary testimony of employee witnesses when their testimony was inherently plausible and consistent with the other credible evidence. Further, I would note, as counsel for the General Counsel points out in her post-hearing brief, that the testimony of current employees against the interests of their current employer should be given added credibility and weight. As the Board noted in *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972); and *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961), the testimony of current employees, which contradicts statements of their supervisors, is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. See also *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5<sup>th</sup> Cir. 1996).

When he testified, William Carranza was still employed as a deli server at the Respondent's coffee shop. According to Carranza, in late November or early December of 2006, in the early evening, he was performing his job in the coffee shop when Lee and his assistant, Robbie Perez, came into the area.<sup>17</sup> As they began to sit down at a table, Lee waived at Carranza that he should come over. Carranza had spoken to Lee before, but only about work related matters. Carranza testified that when he came over, Lee immediately asked him, "What [are] the Union's plans?" Carranza responded that he did not know, followed by Lee's statement, "You should know. You are a union member." Carranza repeated that he did not know, and that, in fact, he was "usually the last one to know." According to Carranza, Lee then turned to Perez and asked, "You used to be a union member, what do you know?" Perez replied that he was no longer a union member, and so did not know anything. Lee then looked back at Carranza and said, "I heard that they're going on strike." Carranza responded that he did not know, but, if that was what Lee had heard, it might be true. Then, according to

<sup>17</sup> The parties stipulated that Robbie Perez was Lee's administrative assistant and an agent and supervisor of the Respondent.

Carranza, Lee asked if he “was going to go on strike.” Carranza answered that he did not know, to which Lee responded that, “Anybody who goes on strike will be easily replaced.” As a customer had entered the coffee shop, Carranza left to provide service, and that ended his conversation with Lee. Carranza estimated that the entire conversation took about five minutes.

Lee testified generally that he never had any such conversation with any employee. However, for the reasons noted above, I do not believe Lee and credit Carranza. He testified in a straight forward and direct manner, and, as noted, adversely to his pecuniary interests. Further, as will be apparent later in this decision, Lee’s conversation with Carranza fit a pattern of such conversations with employees instigated by Lee and other supervisors. The conversation as testified to by Carranza is inherently plausible as during the time period in question, the Union and the Employer were locked in difficult negotiations for a new collective-bargaining agreement where only very limited progress was being made. Under such circumstances, it would not be surprising that Lee would at least be concerned that he might have to face a strike by his unit employees. Therefore, I conclude that Lee spoke the words as testified to by Carranza.

Counsel for the General Counsel contends that in this conversation Lee both interrogated and threatened Carranza. I agree. Regarding interrogation, Carranza’s testimony establishes that Lee specifically asked him what plans the Union had, whether the Union was going to strike, and, if so, whether he planned to join in the strike.

In determining whether a supervisor’s questions to an employee about his union activities were coercive under that Act, the Board looks to the “totality of the circumstances.” *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985). In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as “*Bourne* factors,” so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2<sup>nd</sup> Cir. 1964). These factors include the background of the parties’ relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

As testified to by Carranza, this was the only conversation that he had ever had on a non-work related subject with Lee. Further, Lee was the Respondent’s president, the “big boss,” and it would certainly be reasonable for Carranza to be somewhat intimidated by Lee’s presence and questions. Carranza was questioned at his work station where Lee and Perez had come, a highly unusual situation for Carranza. The questions certainly caught Carranza off guard, were intrusive, and highly personal, as in whether he was going to participate in a work stoppage against his employer, in the person of the very man asking the questions. Carranza’s responses were denials of any knowledge, indicative of an employee fearful of getting into trouble for giving his boss the “wrong answer.” From his view point, Carranza’s trepidations were very genuine, and were not lessened by any assurance from Lee that no adverse consequences would result from the conversation, since no such assurance was given. See also *Millard Refrigerated Services Inc.*, 345 NLRB 1143, 1146 (2005); *Emery World Wide*, 309 NLRB 185, 186 (1992).

Therefore, I conclude that the conversation at issue constituted an unlawful interrogation of Carranza in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 21(a) and 33 of the first complaint.



Further, I am of the view that Lee's statement to Carranza that, "Anybody who goes on strike will be easily replaced" was an obvious threat to punish any unit employee who engaged in their Section 7 right to strike. This was an undisguised threat to terminate strikers. As such, it interfered with, restrained, and coerced Carranza and other unit employees in the exercise of their rights under the Act. Accordingly, I find that the Respondent has again violated Section 8(a)(1) of the Act, as alleged in paragraphs 21(b) and 33 of the first complaint.

#### **F. Interrogation of Merian Salansang and Enrique Camberos**

The parties stipulated that Alex Moon was the Respondent's director of banquets and a supervisor and agent of the Respondent. It is alleged in paragraphs 22(a) and 33 of the first complaint that in early December 2006, Moon, in the Respondent's deli, unlawfully interrogated employees regarding their union activity by asking if they had news about the Union. It is alleged in paragraphs 22(b) and 33 of the first complaint that during the same period, Moon, in the Respondent's cafeteria, while pointing his finger in an employee's face, interrogated employees regarding their union activities by asking if they were there for a union meeting. As was apparent at the hearing, Merian Salansang, a deli attendant, was the employee allegedly interrogated by Moon as set forth in paragraph 22(a) and Enrique Camberos, a kitchen worker, was the employee allegedly interrogated by Moon as set forth in paragraph 22(b), respectively of the first complaint.

Both Salansang and Camberos testified on behalf of the General Counsel. Moon did not testify, nor did any other witness challenge their testimony. Accordingly, the testimony of Salansang and Camberos remains un rebutted. Further, both employees seemed reasonably credible, and, therefore, I shall accept their testimony as accurate.

According to Salansang, she is a member of the Union, and in early December of 2006 she had a discussion with her immediate supervisor, Alex Moon, about the Union. The incident occurred at approximately lunchtime while she was working at the deli counter and register. Moon was passing through the deli at the time and asked Salansang if "something was going on with the Union." She replied that she had no idea. Moon then commented, "You attend[ed] the union meeting. How come you don't know anything?" She answered, "I have no idea because I never attend[ed that] meeting." Salansang testified that Moon then just turned and walked out of the deli. The entire conversation lasted only two or three minutes.

In his post-hearing brief, counsel for the Respondent argues that even if Moon made the statements attributed to him by Salansang that it does not constitute unlawful interrogation as Moon was a low ranking supervisory employee, asking very general questions, without being directed to do so by senior management. However, I disagree with counsel's assessment of the incident.

There was no evidence that Salansang was an open union supporter, and, yet, she was questioned by her immediate supervisor regarding the Union's plans while she was in her work station, during her work hours. Moon's questions certainly were unexpected, caught her off guard, and were solicited without any assurance against reprisals. Further, by his attitude Moon conveyed the impression to Salansang that he did not believe her claimed lack of knowledge. This is exactly the type of interrogation that the Board has found to be coercive. *Rossmore House, supra; Westwood Health Care Center, supra; Millard Refrigerated Services, supra.*

Certainly Moon's questioning of Salansang did not require advance approval of upper management in order to be coercive and constitute unlawful interrogation. Moon, as a statutory supervisor and agent, was speaking on behalf of the Respondent when he interrogated an

immediate subordinate who would reasonably have been fearful of retribution if her answers displeased him. Accordingly, I find that through Moon's conduct, the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraphs 22(a) and (33) of the first complaint.

5 Camberos testified that around December 1, 2006, at lunch time, he came into the employee cafeteria to have lunch, and also to see union representative Salazar who was at the Hotel to meet with unit employees. At the time there were approximately 15-30 people in the cafeteria, most of whom were employees, but Camberos also recognized Salazar, the Respondent's attorney, Andy Kaplan, a security guard, somebody taking pictures, and Alex Moon. He identified Moon as the food and beverage manager.<sup>18</sup>

10 According to Camberos, Moon came over to him as he was standing next to the buffet table and asked, "Are you coming to your lunch or are you coming to a meeting." As Camberos testified he gestured with his finger in a pointing motion. It appeared that he was indicating that Moon made such a gesture with his finger as he spoke to Camberos in the cafeteria.<sup>19</sup> Camberos responded that he was there to have his lunch, and "was also going to a meeting." That was apparently the end of the conversation, which, according to Camberos only lasted a few seconds. Camberos then left the cafeteria without staying for the meeting with Salazar.

20 When questioned by counsel for the General Counsel as to why he did not stay for the meeting, Camberos replied, "Because I didn't want any trouble with Mr. Alex Moon. I have had trouble before." Camberos seemed a sincere, credible witness. His testimony about Moon was not rebutted, and I have no reason to doubt that he left the cafeteria without waiting for the meeting because he was genuinely concerned about upsetting Moon.

25 This is precisely the type of situation where the Board has found that a supervisor's questioning of an employee regarding his attendance at a union meeting constituted a violation of the Act. *American Tool & Engineering Co.*, 257 NLRB 608, 624, 625 (1981); *Glazer Wholesale Drug Co. of New Orleans, Inc.*, 181 NLRB 304, 308 (1970). Further, under the Board's totality of the circumstances test, there is no doubt that Moon's deliberate confrontation with Camberos where Moon questioned him about his reasons for being in the cafeteria, during his lunch break, at the same time Moon pointed his finger at Camberos, would have reasonably caused Camberos to fear further upsetting Moon. *Rossmore House, supra*; *Westwood Health Care Center, supra*; *Millard Refrigerated Services, supra*. The fact that Camberos was worried enough about Moon's reaction to refrain from attending the union meeting was the best indication that Moon's interrogation had been coercive and had achieved the desired result.

40 Moon's conduct reasonably tended to interfere with the exercise of Camberos' Section 7 rights. Therefore, I conclude that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraphs 22(b) and 33 of the first complaint.

### **G. Repudiation of Access and Acts of Surveillance**

45 Paragraph 10, and its various subparagraphs, and paragraph 31 of the first complaint allege that the Respondent repudiated the Union's contractual access to the Respondent's facility in violation of Section 8(a)(5) of the Act. The Union's access to the hotel is governed by section 4(A) of the parties' collective-bargaining agreement (the Agreement). As stipulated to

<sup>18</sup> As stipulated by the parties, Moon's actual title was director of banquets.

50 <sup>19</sup> At the hearing, I represented for the record the motion that Camberos was making with his finger while testifying about his conversation with Moon.

by the parties, that section of the Agreement states in pertinent part that a “[p]roperly authorized representative of the Union shall be permitted to investigate the standing of all employees and to investigate conditions and to see that the terms of the Agreement are being observed. Said representatives shall be permitted to conduct such investigations within the premises of the [Employer]...The Union representative shall advise the personnel office when they come on [the Employer’s] property.... (Jt. Ex. 1, p.12.)

As noted earlier, Oscar Salazar, a former employee of the Respondent, was the union representative who serviced the Respondent’s facility on behalf of the Union. He testified that prior to December 2006, he would visit the unit employees at the facility approximately two or three times a week. Upon arriving at the hotel, his custom was to first alert the security office that he was on the property. Whether anyone was present in the security office or not, he would sign in on the security log and then proceed on to the employee cafeteria. He would inform any employees in the cafeteria that he was on site and would be returning to the cafeteria after he made the rounds of the Hotel to inform other unit employees that he was available to meet with them in the cafeteria. It will become increasingly significant that Salazar testified that prior to December 2006, he never had to explain to management the reason why he was at the Hotel.

On December 1, 2006, Salazar arrived at the Hotel at about 11 am. He testified that there was neither a security guard nor a sign in sheet in the security office, so he signed a document in that office, which was intended for employees to sign out hotel keys during their shifts. After “signing in,” Salazar proceeded past the human resources office, which was closed, to the employee cafeteria where he greeted the approximately 25 employees present. The employees were sitting at tables eating. As soon as he greeted the employees, two women, who he did not recognize, stood up and started yelling at him. Subsequently, he learned from employees that one of the women was Haena Kim, who the parties have stipulated was the Respondent’s director of human resources and a supervisor and agent of the Respondent. (Jt. Ex. 1, p. 6.) The woman who he later learned was Haena Kim was yelling that he “did not have any right” to be there, and that the attorney and owner had said that he was “not to be on the property.” In response, Salazar said that the Agreement gave him permission to be on site and that was his authority. According to Salazar, Haena Kim tried to grab his arm but he pulled away and told her not to touch him.

Within a few minutes a security guard arrived on the scene. Kim then proceeded to order the guard to remove Salazar from the property. Salazar informed the guard that he wanted “to speak with someone who had the power to revoke...the Union’s... access.” According to Salazar, there were approximately 40 unit employees in the cafeteria at this time, along with Haena Kim, the security guard, the Respondent’s counsel, Andy Kaplan, Jihan Kim, stipulated by the parties to be the assistant to the Respondent’s president and a statutory agent and supervisor, and several unidentified individuals.

Kaplan approached Salazar, and, according to Salazar, told him that he (Kaplan) did not want Salazar in the Hotel, and that Salazar “had 30 seconds before the police arrived and removed [him].” Kaplan then started to count for five seconds, showing his watch to Salazar that five seconds had passed. Salazar informed Kaplan that Kaplan knew that he was violating the Agreement between the parties. Kaplan suggested that they continue this discussion in a private office, to which Salazar responded that he would gladly do so, as long as he could bring a witness with him. Kaplan refused to have a witness present and as Salazar would not go with Kaplan without one, Kaplan simply left the cafeteria.

Kaplan's version of his conversation with Salazar in the cafeteria is somewhat different. According to Kaplan, he asked Salazar why he was at the Hotel. Allegedly, Salazar responded, "I don't have to tell you. I'm allowed to come to the Hotel at any time and go anywhere for any reason." Kaplan told Salazar that was wrong, that the access provisions of the Agreement  
 5 limited the reasons why a union representative could come into the non-public areas of the Hotel. Salazar still refused to give Kaplan a reason why he was there, and Kaplan testified that he told Salazar that unless he gave a reason, the Employer would have no recourse but to call the police and have Salazar arrested for trespassing. Salazar told him to do what he had to do, after which Kaplan directed Jihan Kim to call the police.

10 Kaplan denies that he ever told Salazar that he could not be at the Hotel under any conditions or circumstances. It is the Respondent's position that the conditions under which a union representative can be in non-public areas of the hotel are limited to those reasons allegedly set forth in the Agreement. Kaplan contends that since Salazar would not inform him  
 15 of his reason for being at the hotel, Salazar had no legitimate business being there. However, on cross-examination Kaplan acknowledged that the Agreement did not require that the union representative report to the Employer's attorney when entering the Hotel, just that the representative advise the personnel office when on the property.<sup>20</sup>

20 After Kaplan left the cafeteria, Salazar sat down with several employees and began to conduct his business. However, within a short period of time two City of Los Angeles police officers arrived and asked Salazar to step out of the Hotel with them. Once outside, the police informed Salazar that the Hotel had asked to have him removed. Salazar told the officers that the Hotel had a contract with the Union that permitted him to be on the property, and he showed  
 25 them the access provision in the Agreement. A supervisory officer arrived and Salazar also showed him the access provision. That officer then had a conversation with Jihan Kim, who was standing outside the Hotel watching the proceedings. He returned to Salazar and asked him if he had signed in upon entering the Hotel. Salazar answered in the affirmative and after an officer returned from confirming that Salazar had signed in, the supervisory officer had a  
 30 second conversation with Jihan Kim. The supervisor then informed Salazar that as the Agreement gave him the right to be on the property and as he had followed the procedures, the police would not remove him from the property. The officer asked Salazar if he intended to remain further on the property, to which Salazar replied that he had finished his business. Shortly thereafter, Salazar left the Hotel.

35 On December 11, at about 11 am, Salazar returned to the Hotel in the company of Aracely Rubio, a union organizer. Upon arrival they checked in with the security guard present in the security office, signed the visitors' sign in sheet, and received visitors' passes to put on their clothes. They then proceeded towards the cafeteria, but were intercepted by Jihan Kim  
 40 who began walking three to four feet behind them. They initially spoke to Kim, but he did not respond. As was his practice, Salazar entered the cafeteria to tell employees that he was on site and would return. He then made his rounds to inform unit employees working throughout the Hotel that he would be in the cafeteria if they wished to meet with him. Kim continued to follow Salazar and Rubio. At some point Rubio asked Kim why he was following them, to which  
 45 Kim responded, "To make sure [you] don't incur an accident." According to Salazar, on his previous visits to the property he had never been followed by a manager, and had never had a manager express concern for his safety.

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50 <sup>20</sup> It is not necessary to resolve the differences in the testimony of Kaplan and Salazar as they are minor, and, in any event, Kaplan admits directing Jihan Kim to call the police.

When Salazar and Rubio approached the second floor kitchen, Salazar entered and began speaking with employee Enrique Camberos, as Rubio waited outside the room. As Salazar and Camberos spoke, Salazar noticed Sebastian Choo standing in the kitchen pointing a photographic camera at them. The parties stipulated that Sebastian Choo was the Respondent's service manager and a statutory agent and supervisor. (Jt. Ex. 1, p. 6.) Salazar testified that he told Choo to stop taking pictures, but Choo ignored him and continued doing so. Later Kim took the camera and began taking pictures of Salazar and Camberos.

Next, Salazar and Rubio walk over to the Hotel's restaurant where Salazar spoke with a number of unit employees. During this time Kim stood about seven to ten feet away with a camera aimed in their direction. As Salazar and Rubio walked back to the cafeteria, Kim continued to follow them. There were approximately 15-20 employees inside the cafeteria.

Salazar entered the cafeteria while Rubio waited outside the room. Salazar sat down besides employees Roberto Gamez and Manuel Montez, and then noticed that Haena Kim was aiming a camera at them. Salazar told Haena Kim to stop taking pictures, but she failed to respond and continued to taking pictures. During the period of time that Haena Kim took pictures of Salazar talking with employees, Jihan Kim also continued to do the same. None of the managers said anything to Salazar as he sat with employees.

Noelia Elena Lopez, a cafeteria attendant, also testified that towards the middle of December at about lunch time, in the employee cafeteria, she and other employees met with Oscar Salazar. She recalled Aracely Rubio also being present for the meeting. According to Lopez, during that meeting Jihan Kim and Haena Kim both took pictures of the employees as they were meeting with Salazar. At the time, both managers were standing in close proximity to those employees.

It is important to note that neither Choo nor Haena Kim testified at the hearing, and, thus, did not deny the testimony of Salazar that they took pictures of him talking with unit employees. However, Jihan Kim did testify and denied taking any pictures of Salazar talking with employees, or of seeing any other managers taking such pictures. It is, therefore, necessary to decide the respective credibility of Jihan Kim and of Salazar and Rubio.

The parties stipulated that Jihan Kim was the assistant to the Respondent's president, Leo Lee. Kim did not specifically indicate his job title, but Lee testified that Kim was his "assistant," his "right-hand man." From the respective testimony of Kim and Lee, as well as the testimony of various employee witnesses, there is little question that the two men worked together closely, and that Kim was considered the owner's representative at the Hotel. However, his testimony was filled with denials regarding whether he was aware of what other supervisors were doing at the property. As just two examples, he claimed to have no knowledge about the locker search policy instituted by Chamroeun Trinidad, or about whether employees were being paid for the vacation time that they had earned.

Kim testified that he never took pictures of Salazar, nor did he ever see any other supervisors taking such pictures. I do not believe him. Not only did Salazar and Rubio testify that such pictures were taken, but employees Roberto Gamez and Noelia Elena Lopez also testified that they saw Kim taking pictures of Salazar and employees talking in the cafeteria in early or mid- December. This testimony by Salazar, Rubio, Lopez, and Gamez is very detailed, seems genuine, and has the "ring of authenticity" about it.

In general, I did not find Kim credible. His testimony about Salazar's presence at the Hotel in early December 2006 was filled with contradictions, implausible explanations, shifting rationales, and protestations of ignorance. At various times in his testimony, he claimed that in early December he did not know that Salazar was a union representative, and did not know that union representatives were permitted access to the non-public areas of the Hotel to talk with unit employees. At other points in his testimony, he claimed that at the time in question he did know who Salazar was and did know about the access provision, and yet admitted reporting Salazar's presence on the property to attorney Kaplan, and of calling the policy asking them to remove Salazar. When it suited his purpose, he was quite willing to have the listener believe that the Hotel was basically running itself, with upper management, in the form of Lee and himself, being totally unaware of any unfair labor practices being committed.

There is no doubt that both Salazar and Rubio were partisans on behalf of the Union, just as Kim was a partisan on behalf of the Employer. However, the testimony of Salazar and Rubio was inherently plausible and in conformity with the other evidence of record. Not only was Kim's testimony not plausible, it was unsupported by any other evidence. I draw an adverse inference from the Respondent's failure to call Choo and Haena Kim to testify in support of Jihan Kim. I am simply left to conclude that Jihan Kim did not testify credibly, and I shall accept Salazar's and Rubio's version of events when they are disputed by Kim.

Returning to the events of December 11, Salazar remained in the cafeteria talking with employees for about 20 minutes, after which two police officers from the City of Los Angeles arrived and asked him to go outside with them. Once outside, the police told Salazar that they had been called by the Employer's managers, accusing him and Rubio of trespassing. Salazar and Rubio advised the officers of the access provision in the Agreement and showed them that contract clause. Throughout this conversation, Jihan Kim was standing nearby.

The officers spoke with Kim and then returned to Salazar and Rubio and told them that Kim insisted that they had to leave. Kim approached the group and repeated what he had apparently told the officers privately, that Salazar and Rubio needed to leave the property. According to Rubio, she asked Kim if he was denying them access to the Hotel, to which he responded that "[they] have no permission to go inside." Further, Kim said that "if [they] wanted to come back that [they] have to call the attorney who represents [the Employer]." At that point Rubio and Salazar left the property. Since that date, they have not returned to meet with employees inside the Hotel.

On December 12, Salazar and Kaplan spoke by phone. Salazar indicating to Kaplan that he needed to access employees at the Hotel in order to process grievances. According to Salazar, Kaplan told him that he had no right to go into the Hotel, and that they could speak about grievances over the negotiation table. It was during this period that the parties were involved in contract negotiations.

Kaplan claims that he actually called Salazar on December 12, because Jihan Kim had told him the day before that Salazar had returned to the non-public areas of the Hotel. Kaplan admits asking Salazar what he was doing at the Hotel the day before. Allegedly Salazar responded that he could be at the Hotel "any time he wanted for any reason." Kaplan testified that he told Salazar that he could only be at the Hotel "for reasons specified in the collective-bargaining contract." He again asked, and Salazar again refused to tell him why he had been on the property.

Rubio testified that within a week of being denied access on December 11, she called Kaplan to request access to the facility, as Jihan Kim had directed. According to Rubio, Kaplan denied her permission to enter the facility until such time as the Union made the request in writing. On the other hand, Kaplan denied that any such phone conversation with Rubio occurred at all.

Salazar testified that the Employer has never given the Union notice that it was revoking access to the facility to union representatives, and has never given the Union the opportunity to bargain over its revocation of access to the Hotel. Of course, it is the Respondent's position that its agents and supervisors have never revoked the Union's access to the Hotel.

Kaplan's testimony is at some variance with that of Rubio and Salazar as to what was said between them on December 1, 11, 12, and approximately one week later, regarding access to the Hotel. However, in my view it is not necessary for me to resolve these differences. Even if I assume Kaplan's version of the conversations is the more accurate, I believe that the Respondent, through the actions of Kaplan and Jihan Kim, has violated the Act. For all practical purposes, the conduct of the Respondent's agents on those dates serves as a repudiation of the Union's contractually agreed upon access to the facility in violation of Section 8(a)(5) of the Act.

The terms of the Agreement speak for themselves. The access provision, Section 4A, provides that "representatives of the Union shall be permitted access to investigate conditions and to see that the terms of the Agreement are being observed. Said representatives shall be permitted to conduct such investigations within the premises of the Employer...." (Jt. Ex. 2.) Nowhere in that provision does it require the union representative to provide the Employer with its reasons for wanting access to the facility to see the unit employees. Not only is there no such requirement, but there has been no such practice. Salazar's testimony was un rebutted that in the past he would gain access to the facility simply by appearing on the scene, advising security that he would be visiting the facility, and recording his arrival on a sign in sheet in the security office. Further, the access provision requires merely that a union representative "shall advise the personnel office when they come on ...the property." Salazar's practice was apparently to do so, when somebody was available in the human resource office, which was not always the case. In any event, even Kaplan was forced to acknowledge that there in nothing in the contract that requires a union representative to notify Respondent's counsel of the purpose of his visit to the facility.

The comments of Jihan Kim and Kaplan on the dates in question, as well as the conduct of the Respondent's agents in summoning the police on December 1 and 11, were undoubtedly designed to convey the message to the Union that it was no longer going to be permitted access to the facility. Even if the Respondent's agents did not say those exact words, their implication was clear. It was not necessary for the Respondent's agent to have use "magic words," such as access denied for all times and for all purposes. By insisting that the union representatives give specific reasons for their visits prior to being admitted, the Respondent was for all practical purposes denying access in contravention of the collective-bargaining agreement.

Further, I am unimpressed with counsel for the Respondent's argument that the Union's interest in visiting the facility on December 1 and 11 was not for the purpose of bargaining unit representation, and, therefore, under the terms of the Agreement Salazar could be denied entry. Counsel apparently basis this contention on the testimony of Salazar who indicated that one of the reasons why he wanted access to the facility on those dates was to encourage the unit

employees to participate in a job action that the Union was organizing on behalf of the employees of another employer.<sup>21</sup> Of course, the Respondent only learned of this alleged solicitation of employee support “after the fact,” meaning months later, at trial. The Respondent can not use this alleged information retroactively, to “boot strap” its denial of the contractually guaranteed access months earlier. Accordingly, I reject this defense on the part of the Respondent.

It is clear from the conduct of the Respondent’s agents on at least December 1, 11, and 12 that the Respondent was revoking the Union’s access to the Hotel. Further, the Respondent never gave the Union notice that it was revoking access to union representatives, nor did it give the Union an opportunity to bargain over its revocation. The Board has consistently held that “access is necessary in order to investigate and to resolve compliance when the contract grants the Union such access.” *CDK Contracting Co.*, 308 NLRB 1117 (1992), citing *C.E. Wylie Construction Co.*, 295 NLRB 1050, 1051 (1998). See also *Wolgast Corp.*, 334 NLRB 203 (2001). Further, the Board has held that a “union’s access to the jobsite in order to represent its members is a term and condition of employment and subject to bargaining.” *Wehr Constructors, Inc.*, 315 NLRB 867, 878 (1994). Accordingly, the Respondent’s revocation of the Union’s contractual access, and its failure to bargain over this revocation violates section 8(a)(1) and (5) of the Act, as alleged in paragraphs 10 and 31 of the first complaint.

Additionally, the Respondent’s expulsion of union representative Salazar on December 1 and representatives Salazar and Rubio on December 11, in the presence of numerous bargaining unit employees, violated both Section 8(a)(1) and (5) of the Act. In *Unbelievable, Inc., d/b/a Frontier Hotel Casino*, 309 NLRB 761, 766 (1992), enfd. *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9<sup>th</sup> Cir. 1995), the Board adopted the decision of the administrative law judge and found that the respondent’s expulsion of union representatives “had the indirect impact of interfering with union-related communication...or was a direct coercion and restraint of employees who were engaged in the union activity of conversing with their bargaining representative. Either way it violated Section 8(a)(1) of the Act.”<sup>22</sup>

The complaint does not specifically allege the Respondent’s conduct on December 1 and 11 to constitute an independent violation of Section 8(a)(1) of the Act. However, these incidents were fully litigated by the parties, with the Respondent offering the testimony of Jihan Kim and attorney Kaplan as to what occurred. In my view, there is no prejudice to the Respondent, nor any denial of due process, in addressing this fully litigated issue.<sup>23</sup>

<sup>21</sup> Further, it appears from the testimony of employee witnesses that Salazar discussed a number of matters with them on December 1 and 11 that certainly would have been of direct concern to unit employees under the terms of the existing Agreement, or regarding the progress of negotiations on reaching the terms of a new contract.

<sup>22</sup> The Board, in adopting the administrative law judge’s decision in *Unbelievable*, also found that the respondent’s basis for expelling the union representatives was “flimsy” and that as “it deprived employees of their contractually granted access to their bargaining representative, it was a unilateral change of a material term and condition of employment and therefore a breach of Section 8(a)(5).” *Id.* at 762 and 766. As noted above, I have rejected the Respondent’s retroactive argument that the union representatives sought access to the property for reasons unrelated to their representation of bargaining unit members, namely to gather support for a job action at another hotel. In my view, such an “after the fact” argument is nothing less than “flimsy.”

<sup>23</sup> An unpleaded but fully litigated matter may support an unfair labor practice finding despite the lack of an allegation in the complaint, where the unpleaded matter is closely connected to

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The testimony of Salazar, Rubio, and various employees was un rebutted that on both December 1 and December 11 there were significant numbers of employees present in the cafeteria when the Respondent's agents expelled Salazar and Rubio from the Hotel.

Approximately 25-30 employees were present on December 1 when Salazar was expelled, and approximately 15-20 employees were present on December 11 when both Salazar and Rubio were expelled. Certainly this ejection from the Hotel by the Respondent's agents interfered with the employees' exercise of their Section 7 right to communicate with their union representatives. These employees were engaged in classic union activity and the Respondent's actions coerced and restrained them in the exercise of this activity. It was an undisguised attempt by the Respondent to demonstrate to the employees that the Union had no power, and its agents could simply be expelled from the property. In this way, the Respondent sought to undermine and diminish employee support for the Union.

Accordingly, I conclude that the Respondent's actions on December 1 and 11, in expelling union representatives from the Hotel, constituted an independent violation of Section 8(a)(1) of the Act.

Paragraphs 18 and 19, and their respective subparagraphs, and 33 of the first complaint allege that on December 11, 2006, the Respondent, through its agents Jihan Kim, Sebastian Choo, and Haena Kim, engaged in surveillance and/or created the impression of surveillance of employees' union activity in violation of Section 8(a)(1) of the Act. These incidents were fully discussed above in connection with the visit to the Hotel by Salazar and Rubio on December 11. As noted earlier, neither Choo nor Haena Kim testified at the hearing and I have drawn adverse inferences from their failure to testify. Further, for the reasons that I gave above, I found Jihan Kim to be an incredible witness. Accordingly, I credit those witnesses who testified about the conduct of Choo, Haena Kim and Jihan Kim on December 11. The testimony of those witnesses, including employees Roberto Gamez and Noelia Elena Lopez, and union representatives Salazar and Rubio, were inherently plausible, and in conformity with the other evidence presented, and, thus, worthy of belief.

Whether an employer engaged in unlawful surveillance of employees' union activities depends on the specific circumstances in the case, including the nature and duration of the employer's observations. In *Aladdin Gaming, LLC*, 345 NLRB No. 41, at \*2 (2005), the Board held that while an employer's "routine observation" of open, public union activity on or near its property does not constitute unlawful surveillance, an employer violates the Act when "it surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." See also *Partylite Worldwide*, 344 NLRB No. 155, at \*2 (2005) (where managers stood in close proximity to handbillers, surveillance unlawful); *Loudon Steel Inc.*, 340 NLRB 307, 313 (2003). As indicia of coerciveness, the Board looks to such factors as "include the duration of the observation, the manager's distance from employees while observing them, and whether this was an isolated incident or the employer engaged in other coercive conduct during its observation." *Aladdin Gaming, supra*, at \*2, citing *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enf. sub nom. mem., *S.J.P.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993).

the subject matter of the complaint. *Garage Management Corp.*, 334 NLRB 940 (2001); *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995), enf. in part 128 F.3d 271 (5<sup>th</sup> Cir. 1997); *Meisner Electric, Inc.*, 316 NLRB 597 (1995), affd. mem. 83 F.3d 436 (11<sup>th</sup> Cir. 1996); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2<sup>nd</sup> Cir. 1990).

In the matter at hand, there is no doubt that on December 11, the Respondent's managers engaged in conduct that was far from ordinary. Jihan Kim followed Salazar and Rubio through the hallways of the Hotel as they walked to the employee cafeteria, and observed Salazar and Rubio as they met with employees in the cafeteria. Kim also followed the union representatives as they proceeded upstairs to the Hotel kitchen and observed Salazar and Rubio meeting with kitchen employees. While they were in the kitchen, Kim took pictures of the union representatives in discussions with some of the kitchen employees.

During the same incident, Sebastian Choo also followed Salazar and Rubio into the kitchen, observed them in the kitchen talking with bargaining unit employees, and even photographing them doing so. Then they walked to the Hotel restaurant, where they were still followed by Kim, who photographed them there, as well as observing them talking with employees. Next Salazar and Rubio went back to the cafeteria, where their conversations with employees were once again observed by Jihan Kim who took pictures, and then by Haena Kim who also observed them and took pictures.

These observations and photographing of the union representatives and bargaining unit employees were conducted by the three supervisors openly, in plain sight, and in very close proximity to the ongoing union activity. In fact, both Salazar and Rubio asked the supervisors on several occasions to stop taking pictures, but all to no avail.

The Board has held that photographing and videotaping open, public union activity on or near an employer's property is unlawful because such pictorial recordkeeping tends to create fear among employees of reprisals. *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enf'd., 156 F.3d 1268 (D.C. Cir. 1998). In the *National Steel* case the Board reaffirmed its fundamental principles governing employer surveillance of union and other protected activities as set forth in *F.W. Woolworth Co.*, 310 NLRB 1197 (1993).

In this instance I find the Respondent's conduct egregious. There is no question that its supervisors engaged in conduct, which was out of the ordinary and highly unusual. As the Board has said, photographing employees engaged in union activity has the "tendency to intimidate." *Woolworth, supra*. There was no evidence that any such action had ever been taken by the Employer in the past, and no evidence or argument was offered as to why the Respondent sought to conduct itself in this manner on December 11.<sup>24</sup> By its actions, the Respondent was engaged in surveillance and creating the impression of surveillance of its bargaining unit employees. Its only logical reason to have conducted itself in this fashion was to undermine support for the Union, and to interfere with, restrain, and coerce its employees in the exercise of their Section 7 right to confer with their union representatives. Thus, the Respondent's actions were unlawful.

Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraphs 18 and 19, and their respective subparagraphs, and 33 of the first complaint.

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<sup>24</sup>To the extent that counsel for the Respondent argues in his post-hearing brief that "senior management was unaware of photography/videotaping alleged in the complaint," I reject this defense. Jihan Kim, Haena Kim, and Sebastian Choo, respectively the Respondent's assistant to the president, director of human resources, and service manager, were the senior management. In fact, the only higher ranking manager would have been the Respondent's president, Leo Lee, himself. Further, the fact that this unlawful conduct was engaged in by senior management makes it all the more flagrant.

### H. Bulletin Board Access

Section 4(B) of the collective-bargaining agreement between the parties (the Agreement) states in relevant part: "The Employer shall provide the Union with a bulletin board, of reasonable size in a reasonably prominent area of the employees' cafeteria, or at another location(s) if mutually agreed, for posting of notices and other material by the Union...." (Jt. Ex. 1 & 2.) It is alleged in paragraphs 11 and 31 of the first complaint that the Respondent violated Section 8(a)(1) and (5) of the Act since about mid-December 2006 by blocking the Union's access to its bulletin board, located in the hallway near the pay telephones in the Respondent's facility, by placing a large refrigerator in front of it, making it completely inaccessible to the Union.

Union representative Salazar was a ten year, former employee of the predecessor owners of the Respondent's hotel property. He testified that throughout that period of time, until at least December 2006, which was the approximate time frame after which he was expelled from the non-public areas of the Hotel, the Union had a dedicated bulletin board at the facility, located in a hallway, close to the staircase leading to the second floor. As pointed out by Salazar on a diagram during his testimony, the bulletin board, labeled "Union Board," is located across the hallway from the employee cafeteria. (See G.C. Ex. 15.) He described the bulletin board as "a rectangular board made out of corkscrew material, where union information is posted." According to Salazar, as a union representative, he had occasion to post items on the bulletin board five or six times from April 10, 2006, when he became a representative, until December 2006.

However, according to Salazar, sometime, approximately the end of November 2006, he noticed a large, stainless steel refrigerator blocking the union bulletin board. He testified that he saw this refrigerator blocking access to the bulletin board for approximately one month. This, of course, is somewhat inconsistent with Salazar's testimony that he was expelled from the non-public areas of the Hotel on December 11. In any event, Salazar indicated that the Respondent did not notify him in advance about the placement of the refrigerator in front of the bulletin board, nor did the Respondent offer to negotiate over the placement.

On cross-examination, Salazar acknowledged that after seeing the refrigerator blocking the bulletin board, he never asked anybody how it got there. When questioned about postings on the bulletin board, Salazar reminded counsel for the Respondent that since he had been expelled from the non-public areas of the Hotel, he could not know whether there had been any. He had obviously not been able to post any notices, and, as the union representative, he had previously been the person most likely to post union notices. Salazar admitted that there is an employee of the Respondent who is the designated shop steward. He could not say whether she or anyone else had posted any notices on the bulletin board, and no employee had spoken to him about doing so.

Bargaining unit employee Juan Guardado is a cook at the Hotel. He testified that the union bulletin board is located "in the hallway, close to sort of the cafeteria." Further, he testified that beginning about February 2007, for approximately a month and a half to two months, there was a large "aluminum" refrigerator blocking the union's bulletin board. Apparently, after that time, the refrigerator was moved "a short distance so the bulletin board could be seen." The refrigerator and the bulletin board are now "along side each other."

Unit employee Jose Luis Campos is a waiter at the Hotel. He testified that there is a union bulletin board at the Hotel "located on the first floor in the hallway close to the public telephone, almost in front of...the door [to the employee cafeteria]." For a time, a large "broken down refrigerator...aluminum [in color]" was placed in front of the bulletin board. The refrigerator was blocking access to the bulletin board from about January 2007 until about September 2007. Since that time, the refrigerator has been moved to the side of the bulletin board, and apparently the bulletin board can now be accessed. Campos made it very clear that while the refrigerator was blocking the board, notices could not be posted, and those already posted could not be read.

Roberto Gamez, a banquet waiter, was familiar with the union bulletin board, "in the hallway [near the cafeteria]." According to Gamez, there has been a "big refrigerator" from the kitchen placed in front of the bulletin board. He testified that the refrigerator was still in front of the bulletin board, and had been in that position for the previous four of five months.

The Respondent's president, Leo Lee, testified that he is familiar with the union bulletin board, "by the cafeteria." However, he indicated that he had never seen a refrigerator or any other obstruction in front of the bulletin board blocking access to it. He had never directed that any such obstruction be created, nor had he ever been informed that such was the case. Similarly, Jihan Kim testified that he had never seen a refrigerator placed in front of the union bulletin board in the hallway near the cafeteria. He had never seen that bulletin board obstructed, and nobody had ever reported that to him.

As I noted earlier in this decision, I did not find the testimony of Kim and Lee to be particularly credible. Accordingly, I will credit the testimony of Salazar and the four employee witnesses who testified about the refrigerator. However, I find that testimony confusing and contradictory. Each of them remembers something different about the time during which a refrigerator was blocking the union bulletin board. Salazar recalls the bulletin board being blocked starting in late November. Since he could only have seen the refrigerator until December 11, that means that he had knowledge of the obstruction for at most 11 days. Juan Guardado testified that he first saw the obstruction in February 2007, and that within a month and a half to two months, the refrigerator was moved to the side of the bulletin board, where access was no longer blocked. Jose Luis Campos testified that the refrigerator blocked the bulletin board from January to September of 2007, after which it was moved and no longer obstructed access. Finally, Roberto Gamez testified that at the time of his testimony (October 19, 2007), the refrigerator was still in front of the bulletin board, and had been obstructing access for the previous four or five months.

There is simply no way to reconcile these four versions of when the refrigerator blocked access to the union bulletin board, for what period of time, whether it occurred on multiple instances, and even whether the obstruction was ongoing. However, I do not believe that these individuals were intentionally being untruthful. Over the passage of time memories fade, time periods become confusing, and the physical location of a refrigerator in a hallway outside of a cafeteria was not of such magnitude as to impart its particulars on the viewer.

I am convinced that for some period of time there was a refrigerator blocking access to the union bulletin board. However, counsel for the General Counsel has failed to establish with sufficient particularity when this occurred and for how long it occurred. Further, the General Counsel has failed to establish by a preponderance of the evidence whether the obstruction was intentionally created by the Respondent in an effort to frustrate the union's representation duties, to interfere with employees' Section 7 rights, in contravention with the Union's collective-bargaining responsibilities, or in violation of the Respondent's duty to bargain with the Union.

Under these circumstances, there is insufficient evidence to establish that the Respondent blocked access to the union bulletin board in violation of the Act. Accordingly, I shall recommend that paragraph 11 of the first complaint be dismissed.

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### I. Interrogation of Zainal Abidin

It is alleged in paragraphs 23 and 33 of the first complaint that on January 17 or 24, 2007, the Respondent, by Leo Lee, in the company of Robbie Perez, interrogated employees regarding their union activities in violation of Section 8(a)(1) of the Act. As was apparent at the hearing, the employee who was allegedly interrogated by Lee was Zainal Abidin. He works for the Respondent as a bartender in the lobby bar.

According to Abidin, on either January 17 or 25 at about 8 pm, he was working in the lobby bar when Lee, in the company of a man named Robinson,<sup>25</sup> entered the bar. Abidin testified that Lee ordered drinks, and when Abidin returned with the drinks, Lee asked him "if the Union people [were] approaching [him]." Abidin responded "no," and there was nothing else said about the matter. Lee remained in the bar drinking, but there was no further mention of the Union. Further, Abidin testified that prior to that night, Lee had never spoken to him about the Union.

During his examination, Lee denied that he had ever asked any employees of the Hotel what their views were about the Union, if the Union had come to them, or what the Union's plans were. However, he was not specifically asked about a particular conversation with Abidin.

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In my view, this incident, assuming it occurred, does not rise to the level of an unfair labor practice. Counsel for the General Counsel contends that Lee's question directed to Abidin constitutes unlawful interrogation concerning union activity. Rather, I believe it was too ambiguous and benign to constitute an unfair labor practice. Under the "*Bourne* factors," this innocuous question asked of Abidin in a fleeting way, with no follow up, and without any threat of any kind, was not of the sort as would reasonably interfere with, restrain, or coerce employees in the exercise of their Section 7 activity. *Westwood Health Care Center, supra*; *Bourne v. NLRB, supra*; *Rossmore House, supra*. Accordingly, I shall recommend that paragraph 23 of the first complaint be dismissed.

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<sup>25</sup> It is unclear exactly who Robinson is, and, in any event, he is not alleged as a supervisor or agent of the Respondent. The complaint names the person accompanying Lee on this occasion as Robbie Perez, who is a stipulated supervisor and agent. When it became apparent that it was Robinson and not Perez who allegedly accompanied Lee, counsel for the Respondent objected to the receipt of this evidence on the basis that the incident was not alleged in the complaint. I overruled counsel's objection because the allegation as drafted was sufficiently detailed to advise the Respondent of the substance of the General Counsel's contention. There was no unfair labor practice attributed in this complaint paragraph to anyone but Lee. In my view, the allegation was not defective merely because the wrong person had been named as having accompanied Lee. As the pleading had contained adequate specificity to put counsel on notice, there was no due process violation in allowing the General Counsel to go forward and present evidence. Further, while counsel for the Respondent had ample opportunity to call Robinson to testify, he never did so.

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## J. Reduction of Lobby Bar Hours

The General Counsel alleges in paragraphs 15, and its subparagraphs, 27(a), and 31 of the first complaint that since about January 28, 2007, the Respondent, unilaterally and without negotiating with the Union, has changed the hours of its lobby bar, eliminating the daytime shift, and causing the layoff of one unit employee in violation of Section 8(a)(1) and (5) of the Act.

The parties stipulated that prior to about January 28, 2007, the Respondent's lobby bar was open from 11 am until 12 midnight, and that the Respondent employed one employee in the lobby bar during the day shift. The parties further stipulated that about January 29, 2007, the Respondent changed the hours of the lobby bar and eliminated the daytime shift. (Jt. Ex. 1, p.14, par. 18.)

According to union representative Oscar Salazar, he first learned that the Respondent had eliminated the day shift in the lobby bar when the employee who had been employed as the bartender on that shift called him to say that the shift had been "canceled" and that person was out of work. Salazar testified that the Respondent had failed to give him any advance warning that the shift was being eliminated, and had offered the Union no opportunity to bargain over this matter. Additionally, Salazar testified that the Respondent had failed to give the Union any opportunity to bargain over the effects of the elimination of the lobby bar day shift. This testimony was unrebutted by the Respondent, and counsel for the Respondent offered no defense against this allegation.

The Respondent's elimination of the day shift in the lobby bar in the manner described above constituted a unilateral change in the terms and conditions of employment of unit employees and violated Section 8(a)(1) and (5) of the Act. The Respondent provided the Union with no notice of the shift elimination, nor any opportunity to bargain over that change and its effects on bargaining unit members. The Respondent clearly violated its duty to bargain when it instituted this change in employment conditions without first consulting and bargaining with the Union. *NLRB v. Katz*, 369 U.S. 736 (1962); *Soule Glass & Glazing Co.*, 652 F.2d 1055, 1084 (1<sup>st</sup> Cir. 1981); *Hartford Hospital*, 318 NLRB 183, 194 (1995); *Kiro, Inc.*, 317 NLRB 1325, 1337 (1995).

Accordingly, I conclude that the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 15, and its subparagraphs, 27(a), and 31 of the first complaint.

## 3. Negotiations and Impasse

### A. Cost Calculations Information Request

As has been mentioned above, and set forth in the joint stipulation (Jt. Ex. 1.), the Respondent assumed the Agreement entered into by the Union and the Radisson Wilshire Plaza Hotel that was effective from April 16, 2004, to April 16, 2006. The Agreement was extended by the Respondent and the Union on April 18, 2006, through and including July 16, 2006; and was extended again on August 22, 2006, such that it was in effect until and unless terminated by either party upon ten days written notice to the other party. By letter dated December 14, 2006, the Union provided the Respondent with ten days written notice to terminate the Agreement. As a result, the Agreement terminated on December 24, 2006. (Jt. Ex. 1, 2, 3, 4, and G.C. Ex. 13.)

Representatives of the Union and the Respondent began to meet to bargain for a new collective-bargaining agreement in August 2006. The parties met ten<sup>26</sup> times on the following dates: August 15, October 30, November 9, November 15, November 28, December 9 (all in 2006), and January 16, January 25, January 30, and February 12, 2007. The principal negotiators for the Respondent were attorneys Kaplan and Jeffrey Mayes. The principal negotiators for the Union were Tom Walsh, the Union's secretary/treasurer, Oscar Salazar, and Fred Pascual.<sup>27</sup> Other participants came and went. The sessions were all held at the Hotel, and the majority of them began at approximately 4 pm, in order to accommodate the employee negotiators who would be coming off a work shift.

Paragraph 12(b) of the first complaint alleges that on January 16, 25, and 30, 2007, the Union requested that the Respondent furnish it with "detailed" calculations of the cost of the Respondent's economic proposals made during negotiations. It is further alleged in paragraphs 12 (f), (g), and 31 that the Respondent failed and refused to furnish this information to the Union, which information was necessary and relevant to the Union's collective-bargaining duties, in violation of Section 8(a)(1) and (5) of the Act. In its post-hearing brief, counsel for the Respondent contends that this information was furnished the Union during negotiations.

Without going into the specifics at this point in the decision, it is sufficient to note that throughout negotiations the parties were far apart on economic issues. The Respondent's "mantra," as stated repeatedly by attorney Kaplan throughout negotiations, was that the Respondent was losing a large amount of money and needed significant monetary concessions from the Union in employee wages and benefits in order to continue operating. To that end, the Respondent offered contract proposals containing significant reductions in wages, benefits, and other terms and conditions of employment with pecuniary value.

Tom Walsh testified that on at least three occasions, the Union requested that the Respondent furnish it with detailed calculations of some of the Respondent's economic proposals made during negotiations, so that the Union could better prepare counterproposals. The parties stipulated that the Union made this information request orally on about January 16, 2007, and in writing on January 25 and 30, 2007. Further, the parties stipulated that this information was necessary for, and relevant to, the Union's performance of its duties as the collective-bargaining representative of the Unit. (Jt. Ex. 1, par. 15; Jt. Ex. 12, p. 1; Jt. Ex. 13, p. 2.) The Union negotiators wanted to know specifically what the Respondent's alleged cost savings would be for some of its proposals.

<sup>26</sup> Counsel for the Respondent takes the position that there were actually eleven bargaining sessions. Attorney Kaplan contends that he and his associate, Jeffrey Mayes, appeared on September 20, 2006, for a scheduled bargaining session, but no representative of the Union appeared at the appointed time. Kaplan testified that he and Mayes eventually left with no bargaining taking place. On the other hand, Tom Walsh, the Union's secretary/treasurer, testified that when he arrived at the negotiation site there were no representatives of the Employer present. Ultimately, he and the other union negotiators left with no negotiations taking place. In my view, it is not necessary to resolve this dispute or determine which side was at fault in not appearing at the appointed place and time. All that is necessary to conclude, of which there is no dispute, is that no face to face negotiations were conducted on this date.

<sup>27</sup> At the time Pascual testified, he was the director of Southern California, laundry and food services for the Union. When involved in negotiations with the Respondent, he had been the Union's director of hotels. Apparently, he was initially designated by the Union as the chief negotiator, but after the first bargaining session, he was replaced by Walsh. Thereafter, he only attended one or two sessions.

On cross-examination, Walsh admitted that on two occasions the negotiators took out their calculators and attempted to run numbers furnished by Kaplan in an effort to determine the amount allegedly to be saved by implementing the Respondent's proposals. Walsh described the information furnished to the Union by Kaplan on January 16, 2007 as "flat amounts." In any event, the Union was apparently not satisfied with this rather inexact calculation of the alleged savings, and Walsh made it clear in his letter of January 25, 2007, that the Union wanted to know specifically "how much money [the Employer] believe[s] will be saved by each proposal,"... [and to] provide details on how [the Employer] calculated the figures." (Jt. Ex. 12, p. 1.) In a second letter dated January 30, 2007, Walsh indicated that the requested calculations had still not been forthcoming, and he "urged" the Employer to furnish the calculations as it would "assist [the Union] in responding to [the Employer's] economic package." (Jt. Ex. 13, p. 2.) Walsh testified that at the bargaining session on January 30, he also orally requested the information again, but that Kaplan indicated he did not have it available. It is both the Union's and the General Counsel's position that the Respondent has never furnished the requested "detailed" calculations.

As mentioned, the parties have stipulated that the Union requested "detailed calculations of the cost of some of the Respondent's economic proposals," and that the information requested was necessary and relevant for the Union's performance of its collective-bargaining responsibilities. As such, the Union was legally entitled to be furnished with this information by the Respondent. *Disneyland Park and Disney's California Adventure, supra*; *NLRB v. Truitt Mfg. Co., supra*; *NLRB v. Acme Industrial Co., supra*; *Detroit Edison Co., v. NLRB, supra*. The only remaining question is whether the Respondent has done so. I believe it has not.

While neither the General Counsel, the Union, nor the Respondent sought to introduce the actual figures furnished to the Union by Kaplan during negotiations, this may not have been possible as it appears these figures were not memorialized, but were merely given orally and then run through some hand calculators by the negotiators. The testimony of Walsh and Kaplan was not really at variance regarding what was furnished to the Union. It seems that these were inexact calculations, or, as Walsh described them, "flat amounts." As such, they do not meet the Union's request that it be furnished with "detailed calculations." Several oral requests and two written requests later, the Union was still without the detailed information it had been requesting. Without this requested information, the Union would have difficulty drafting counter proposals to those of the Respondent, which were allegedly designed to save the Respondent enough money to remain solvent.

As the Respondent has failed to furnish the Union with the requested detailed calculations, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 12(b), (f), (g), and 31 of the first complaint.

## **B. Radisson International Lawsuit Information Request**

Paragraph 12(c) of the first complaint alleges and the parties stipulate that since about January 30, 2007, both orally and in writing, the Union has requested that the Respondent furnish it with information concerning the lawsuit and the penalties that may be owed by the Respondent to Radisson Hotels International Inc. (Radisson), as a result of a lawsuit seeking a \$1,000,000 judgment. Further, the complaint alleges in paragraph 12(e) and the parties stipulate that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit. (Jt. Ex. 1, par. 15 (c), p. 13.) It is alleged in paragraphs 12(g) and 31 of the complaint that by not furnishing the Union with this information, the Respondent violated Section 8(a)(1) and (5) of the Act. While the



General Counsel and the Union contend that this information was not forthcoming, the Respondent argues that to the limited extent it had information related to the lawsuit, it was provided to the Union.

5 Walsh testified that at the negotiation session of January 30, 2007, he asked Kaplan for a copy of a lawsuit, which the Radisson had filed against the Respondent, and which lawsuit Kaplan had mentioned to Walsh. Further, in a letter to Kaplan dated January 30, 2007, Walsh reiterated his request for a copy of said lawsuit. (Jt. Ex. 13, p. 2.)

10 According to Kaplan, on January 25, 2007, shortly before the negotiation session of that day began, he was informed by an attorney representing the Employer, not associated with Kaplan's firm, that in a lawsuit brought by Radisson International, the former franchisor of the Hotel, the Judge had just issued a Summary Judgment in favor of the Radisson. Further, Kaplan was told that the Summary Judgment could be for an amount in excess of one million  
15 dollars. Kaplan testified that during the negotiations on January 25, he gave this information to Walsh, as it could have a significant negative impact on the financial position of the Hotel.

Kaplan acknowledged that on January 30, 2007, Walsh requested information regarding the Radisson suit. However, he testified that as of that date, to his knowledge, "nothing in  
20 writing existed." His firm was not counsel of record in the case, and he was advised that "the decision on the Summary Judgment had been enunciated by the Court on the 25<sup>th</sup> orally, and that a Summary Judgment, actual Summary Judgment itself had not been issued." Apparently, a settlement agreement was eventually reached between the parties in the Radisson lawsuit, as introduced into evidence was a copy of such a settlement agreement executed on March 15,  
25 2007. (Res. Ex. 5.)

As stated in his post-hearing brief, counsel for the Respondent argues that as of the date of the Union's request for copies of the Radisson lawsuit, Kaplan had no such documents in his possession, and, thus, nothing to furnish the Union in response to the Union's information  
30 request. However, in my view this is a highly disingenuous argument. A lawsuit had been filed and obviously those pleadings existed, and perhaps other responsive pleadings as well. The Employer was the defendant in that lawsuit and had legal representation. As the Respondent's agent in the negotiations with the Union, Kaplan had an obligation to obtain these documents from the Respondent's ownership or from the lawyers representing the Respondent in the civil  
35 action. Since Kaplan offered no testimony or evidence that in fact he attempted to secure copies of the lawsuit and other pleadings, I shall assume that he did not do so. Frankly, it appears that he made no efforts whatsoever to furnish the Union with the requested information.

The parties stipulated that the requested information about the Radisson suit was  
40 necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees. As such, the Respondent was legally obligated to provide the Union with this information in a timely fashion. *Disneyland Park and Disney California Adventure, supra*. The Respondent, through its agent, Kaplan, made no effort to do so. Accordingly, the Respondent has violated Section 8(a)(1) and (5) of the Act, as  
45 alleged in paragraphs 12(c), (f), (g), and 31 of the first complaint.

### **C. Impact of Unremedied Unfair Labor Practices on Negotiations**

As noted, the Union and the Respondent had ten face to face negotiations between  
50 August 15, 2006 and February 12, 2007, in an effort to reach agreement on the terms of a new collective-bargaining agreement. The parties stipulated that on January 30, 2007, the Respondent declared the Union and the Respondent to be at impasse, and on February 1,

2007, the Respondent implemented certain provisions of its so-called "last, best, and final offer." (Jt. Ex. 1, par. 17.) This implemented offer changed the wages, hours, and working conditions of the unit employees that had been in effect under the terms of the expired Agreement. (Jt. Ex. 14.)

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Counsel for the General Counsel alleges in paragraphs 14 and 31 of the first complaint that as the parties had not reached a lawful, good-faith impasse in their collective-bargaining negotiations, that the Respondent's actions in changing the terms and conditions of employment of the unit employees constituted a violation of Section 8(a)(1) and (5) of the Act. On the other hand, the Respondent argues that the parties had remained very far apart, especially on economic issues, throughout the course of negotiations, and that following a lawful impasse in negotiations, the Respondent was legally entitled to implement its "last, best, and final offer." Correspondingly, the Respondent contends that the bargaining history establishes that it bargained in good-faith, and that only the Union's refusal to accept the Respondent's dire financial condition prevented the parties from reaching an agreement on a new contract.

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In any event, I am of the view that it is not necessary to examine the individual bargaining sessions or the totality of the negotiations, as the Respondent's unremedied unfair labor practices were so extensive and pervasive as to make it practically impossible for the parties to have engaged in good-faith negotiations. The record establishes a casual connection between the Respondent's numerous and significant unfair labor practices and the parties failure to reach agreement on the terms of a new contract. I believe that the Respondent's actions were deliberate, initiated by its highest ranking managers, and carried out in an effort to destroy the Union's support among bargaining unit members. Therefore, I conclude that the Respondent cannot be permitted to benefit by its misconduct, and it cannot lawfully declare the parties to be at impasse.

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As found by the undersigned, the list of unfair labor practices committed by the Respondent prior to declaring impasse is a long one. It includes: a delay in remitting union dues and related information, a failure to contribute to various trust funds and submit related reports, a refusal to process grievances and furnish requested related information, the discriminatory search of employee lockers, the unlawful interrogation of employees, the repudiation of hotel access for the Union, acts of surveillance, unilateral elimination of the lobby bar day shift, and the failure to furnish requested information bearing on negotiations. Some of these unfair labor practices can without exaggeration be described as having a devastating effect on the bargaining unit, and the employees' support for the Union.

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The Respondent's failure to make contractually required payments to the Welfare Funds caused the medical insurance carrier, which coverage was established through the Funds, to discontinue the medical insurance of unit employees. The employees were justifiably extremely upset and frightened by suddenly finding themselves and their families without medical insurance coverage. They were so upset as to engage in a mass protest outside the offices of Chamroeun Trinidad, the human resources/payroll coordinator. The Respondent exacerbated the problem, coercing the leaders of that protest by almost immediately discriminatorily searching their lockers, on the pretext of looking for drugs and guns. Additionally, the Respondent's president, Leo Lee, and director of banquets, Alex Moon, engaged in the unlawful interrogation of employees to determine the extent of the employees' union activity.

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In another serious of actions designed to undermine employee support for the Union, various managers including Haena Kim, director of human resources, Jihan Kim, assistant to the president, and Sebastian Choo, service manager, took photographs of employees involved in union activity, and otherwise engaged in acts of surveillance as the employees met with union

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representatives Salazar and Rubio. Further, Jihan Kim and the Respondent's attorney and agent Kaplan took action to remove the union representatives from the Hotel, including the summoning of police and the revocation of the Union's contractual right of access to the property.

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These actions by the Respondent were all the more devastating to the employees' Section 7 right to support the Union by virtue of the fact that they were perpetrated by the highest ranking managers on the property, including Leo Lee, Jihan Kim, Haena Kim, Alex Moon, and Sebastian Choo. It would simply be naive to believe that after such extensive unremedied unfair labor practices by the Respondent that the parties could sit face to face and engage in meaningful bargaining.

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The Board has held that in general, "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001). In that case, the Board agreed with its administrative law judge that "respondent's unremedied unfair labor practice had a direct, serious, and pervasive adverse effect on the bargaining process and that there was a casual connection between these unremedied unfair labor practices and the parties' failure to reach agreement." [internal quotation marks omitted] Under those circumstances, the respondent could not declare impasse and implement its final contract proposal. *Id.*; see *Anderson Enterprises, d/b/a Royal Motor Sales*, 329 NLRB 760, 762-764 (1999); *White Oak Coal Co.*, 295 NLRB 567, 568 (1989). In *Wayne's Dairy*, 223 NLRB 260, 265 (1976), the Board said that, "A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes."

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Still, the Board has recognized that not every unfair labor practice has a casual connection with the parties' failure to reach agreement. The Board has noted that while no unfair labor practice is insignificant, in the context of determining whether impasse is present, some have more significance than others. Unilateral changes in employees' terms and conditions of employment may constitute significant violations of the Act, in the context of which no impasse can be reached. *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), *endf.*, 192 F.3d 133, 138 (D.C. Cir. 1999). Certainly, in the matter before me, the Respondent's unilateral failure to make Welfare Fund contributions, which resulted in the employees losing medical insurance coverage, would have caused such consternation among the bargaining unit employees as to have dramatically affected the negotiations. In fact, it permeated the negotiations, with Walsh testifying that barely a session went by where the Respondent's failure to make Welfare Fund contributions was not brought up by the Union.

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In *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002), the Board reviewed the two ways in which an unremedied unfair labor practice can contribute to the parties' inability to reach an agreement on a contract. According to the Board, an unfair labor practice can first "increase friction" at the bargaining table. Next, by changing the status quo, a unilateral change may "move the baseline for negotiations and alter the parties' expectation about what they can achieve, making it harder for the parties to come to an agreement." (Board citing *Alwin Mfg. Co.*, *supra*, at 192 F.3d 133, 138.) In my view, this is precisely what occurred in the case at hand. The Respondent's unfair labor practices were so pervasive and destructive of the bargaining unit as to cause the employees and their union representatives to be "reeling."

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As counsel for the General Counsel points out in her post-hearing brief, the loss of their medical insurance coverage due to the Respondent's unlawful unilateral action was so severe and detrimental to the employees' welfare that the Union was under great pressure simply to

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restore the status quo. In this way, the Respondent had “effectively moved the baseline for negotiations to a considerably lower level and seriously undermined the Union’s bargaining position on an issue being addressed in negotiations.” *Lafayette Grinding Corp.*, *supra*, at 833.

5 It is apparent to me that the Respondent’s pervasive pre-impasse unfair labor practices were deliberately undertaken by the Respondent’s senior managers in an effort to undermine support for the Union and force the union negotiators to accept a more onerous contract than they might have otherwise. The Respondent’s conduct certainly “moved the baseline” such that the Union was fighting merely to recoup what the Respondent had already unilaterally discontinued. The atmosphere that the parties were negotiating in was overheated due to the Respondent’s conduct, which included an effort to prevent the union representatives from even accessing the Hotel, a contractual right, at a time when the Respondent’s managers were violating the Section 7 rights of the employees through unlawful interrogation and discriminatory locker searches.

15 The Respondent must not be permitted to benefit by its unremedied unfair labor practices. Under these circumstances, a lawful impasse was not reached by the parties. Accordingly, the Respondent could not lawfully declare an impasse on January 30, 2007. Concomitantly, the Respondent could not lawfully implement portions of its so-called “last, best and final offer” on February 1, 2007.

25 Therefore, by implementing portions of that offer, the Respondent instituted unilateral changes in the terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to these changes. See *NLRB v. Katz*, 369 NLRB 736 (1962). Accordingly, the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 14, and its subparagraphs, 27(b), and 31 of the first complaint.<sup>28</sup>

30 Before passing from the area of the Respondent’s pre-impasse conduct, I will note that in her post-hearing brief, counsel for the General Counsel argues that the Respondent’s non-compliance with multiple major portions of the Agreement also constitutes a total repudiation of the Agreement. I concur. As counsel enumerates, prior to declaring impasse, the Respondent had engaged in the following acts of non-compliance: a delay in remitting union dues and related information; its failure and refusal to continue making required contributions to the Funds and to submit related reports to the Funds; and a unilateral change in and repudiation of the union access provisions.

40 The Board has found employers that engaged in similar non-compliance with collective-bargaining agreements to have repudiated their contracts. See *Victory Specialty Packaging Inc.*, 331 NLRB No. 139, at \*2 (2000) (failure to make health insurance premium payments and to remit union dues constituted contract repudiation); see also *William Pipeline Co.*, 315 NLRB 630, 631-632 (1994). In *Republic Die and Tool Co.*, 343 NLRB 683, 686 (2004), the Board, in adopting the decision of its administrative law judge, noted the “fundamental importance to employees of wage and fringe benefit provisions,” and that an employer’s failure and refusal to comply therewith effectively “guts” the agreement of its meaningfulness to employees.

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50 <sup>28</sup> Having found that due to the Respondent’s unremedied unfair labor practices, it could not lawfully declare an impasse, it is unnecessary for me to determine whether the Union or the Respondent was at fault in a delay that ensued regarding the Union’s request to conduct an audit of the Respondent’s financial books and records.

Accordingly, I believe that the Respondent's conduct in not complying with multiple major portions of the Agreement as alleged in paragraphs 7, 8, and 10, of the first complaint constituted a general repudiation of the Agreement in violation of Section 8(a)(1) and (5) of the Act.<sup>29</sup>

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#### 4. Post-Impasse Conduct

##### A. Employee Wage Rate Information Request

10 Following the Respondent's declaration on January 30, 2007, that impasse had been reached in negotiations, and its implementation of certain provisions of its so-called last, best, and final offer on February 1, 2007, the parties had one additional negotiation session on February 12, 2007. This session was held at the request of the Union. According to the testimony of Walsh, at that final session he asked for information regarding the new wages  
15 being paid to housekeepers and cooks. Apparently the Respondent had instituted a two wage system for housekeepers and something similar for cooks. The Union did not understand how the Respondent decided to pay some housekeepers and cooks the lower rate and others a higher rate. It did not seem to be based on seniority. Walsh testified that he asked for information explaining on what basis the Respondent decided to pay housekeepers a particular  
20 rate. At the same time, he also asked for the Union to be provided with a list of all the bargaining unit employees, including the housekeepers and cooks, and their job titles, and new wage rates as established by the Respondent. Walsh testified that while the Respondent's negotiators promised to provide this information, none has been forthcoming.

25 Kaplan acknowledged that at the February 12, 2007 session, Walsh made a request for a list of employee names, classifications, and post-implementation rates of pay for all bargaining unit employees. Further, he admitted that Walsh asked for information as to how the Respondent had placed employees within a particular classification, as "there were two or three different levels of cook and two or three different levels of housekeepers." Kaplan testified that  
30 he explained to Walsh that it was based upon "experience in the industry." In any event, when Kaplan testified he could not remember the specific details. On cross-examination, Kaplan admitted that he never responded to these Union requests in writing. However, it does appear that ultimately, on April 16, 2007, Kaplan sent Walsh a letter with attachments containing "a list of current bargaining unit members, together with their post-implementation classification and wage rates."<sup>30</sup> (Res. Ex. 1.) Still, nothing in this document explains specifically why employees  
35 are placed in any particular wage classification. Kaplan provided this list to the Union following not only the oral request of February 12, but also a subsequent written request from Walsh dated February 23, 2007. (G.C. Ex. 27.)

40 <sup>29</sup> This underlying conduct by the Respondent has been fully litigated. As noted earlier, an unpleaded but fully litigated matter may support an unfair labor practice finding despite the lack of an allegation in the complaint. (See cases cited under footnote 23, supra.) Therefore, due process has not been abridged.

45 Further, as I have concluded that the Respondent's conduct constituted a general repudiation of the Agreement, I need not consider the General Counsel's alternate contention that the Respondent's conduct constituted at least an unlawful partial modification of the Agreement, as alleged in paragraphs 13(b) and 28 of the first complaint.

50 <sup>30</sup> Walsh testified that he never actually received Kaplan's letter dated April 16, 2007, with the employee list allegedly attached to it. However, as the letter appears to have been properly addressed and both mailed and faxed to the Union's office, I will assume that it was received by the Union, even if Walsh did not personally see a copy.

In his post-hearing brief, counsel for the Respondent argues that in fact some of this information was furnished to the Union during negotiations. Counsel references notes taken during negotiations by various union representatives. On pages 63 and 67 of those notes, dated February 12, 2007, there are some cryptic references to cooks, and "HSPK," presumably meaning housekeeping employees, and the numbers of years of experience in the classifications. (Res. Ex. 9, p. 63 & 67.) However, after reviewing the notes, I am unclear as to which union representative made the notes, and specifically what they establish, other than showing that the issue of classifications for cooks and housekeeping employees was discussed.

Paragraphs 12(d), (f), (g), and 31 of the first complaint allege that the Union's request of February 12, 2007, for information as to how the Respondent differentiated between the housekeeping and cook classifications, was necessary and relevant to its performance as the collective-bargaining representative of the Unit, and that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to furnish that information. Similarly, paragraphs 12(e), (f), (g), and 31 allege that the Union's request of February 12, 2007, for a list of all unit employees including their names, job titles, and post-impasse implementation wage rates, was necessary and relevant to its performance as the collective-bargaining representative of the Unit, and that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to furnish that information. In my view, these two separate allegations regarding information requests are intimately connected and need to be viewed collectively, as the information was requested by Walsh at the same negotiation session, February 12, 2007, in an effort to understand what wage rates the Respondent had unilaterally implemented on February 1, 2007.

The parties stipulated that, since about February 12, 2007, orally, the Union has requested that the Respondent furnish it with a list of all unit employees including their names, job titles, and post-impasse implementation wage rates. Further, they stipulated that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit. (Jt. Ex. 1, par. 15.) The Union's oral request of February 12, 2007 for the information concerning how the Respondent differentiated between the housekeeping and cook classifications is no less necessary for, and relevant to, the Union's performance of its collective-bargaining duties, and I so find.

As the Union was entitled to receive all the information requested on February 12, 2007, the only remaining question is whether the Respondent furnished that information. It is significant to note that the Union needed this information because the Respondent had unilaterally changed the wage rates of unit employees in violation of the Act. The only response to the Union's information request that is apparent from the evidence is a partial oral response on February 12 concerning the cook and housekeeping classifications, but seemingly without any indication of the wage rates being paid to respective classifications (Res. Ex. 9) and then, ultimately, the written list of names, wage rates, and classifications attached to Kaplan's letter of April 16, 2007, (Res. Ex. 1).

It appears to me from the cryptic union bargaining notes that Kaplan's response of February 12, 2007 was inadequate. The response was incomplete, giving classifications for cooks and housekeepers without any apparent tie to wage rates. Further, the list of April 16, 2007, while it did provide employee names, classifications, and wage rates for unit employees, was received over two months after the February 12 request. This was an untimely response, especially in light of the Union's need to have the information quickly in order to react to the Respondent's unilateral changes in employee wages.

The Board has indicated that what constitutes reasonable promptness must be determined under the totality of the circumstances in each case. There is no “per se” rule, rather, what is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. *Allegheny Power*, 339 NLRB 585, 587 (2003). Under the

5 circumstances of this case, I believe that a two month delay was not reasonable. None of the information sought by the Union was particularly complex, and was likely readily available from the Respondent’s payroll and personnel records, which should have been easily accessed through its computer system. *Samaritan Med. Ctr.*, 319 NLRB 392, 398 (1995). After all, it was

10 the Respondent that had just unilaterally implement its wage proposals, as contained in its so called last, best, and final offer, and it certainly should have had that information readily available. There is simply no evidence to suggest that a two month delay in furnished the union with the requested information was anything but unreasonable. See *U.S. Postal Service*, 332 NLRB 635, 641 (2000) (Board found a violation where delay in furnishing the information was five weeks); *Woodland Clinic*, 331 NLRB 735 (2000) (seven week delay unreasonable);

15 *Zikiewicz, Inc.*, 314 NLRB 114 (1994) (two month delay unreasonable).

Based on the totality of the circumstances in this case, I believe that the Respondent was under a legal obligation to make the requested information immediately available to the Union. Instead, the Respondent only furnished the Union with partial information regarding the

20 cook and housekeeper classifications and pay rates, and unreasonably delayed for two months in furnishing the list of employee names, classifications, and wage rates for all unit employees. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 12(d), (e), (f), (g) and 31 of the first complaint.

#### 25 **B. Group Interrogation and Statement of Futility by Jihan Kim**

Paragraphs 24(a) and 33 of the first complaint allege that on February 1, 2007, the Respondent, by Jihan Kim interrogated employees regarding their Union activities in violation of Section 8(a)(1) of the Act. Paragraph 24(b) and 33 of the first complaint allege that on that

30 same date Kim made a statement of futility regarding union representation by informing employees that they no longer had a union. According to the complaint, these incidents occurred near the doorway of Haena Kim’s office.

As noted above, on February 1, 2007, the Respondent unilaterally implemented its so-

35 called last, best, and final offer. There is no dispute that this included significant wage reductions for unit employees. Housekeeper and union steward Griselda Campos testified that her hourly wage rate was reduced from \$11.42 per hour to \$7.55 per hour. Other employees had their wages similarly reduced and they began to gather and talk about the reductions. A group of 15-20 employees decided to go to the office of human resources director Haena Kim and confront her about the wage reductions. They did so at about 3:50 pm on February 1.

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According to Campos, Haena Kim showed each of the assembled employees a paper containing the amount of that person’s new wage rate. This meeting with Haena Kim lasted about ten minutes. However, some employees, including Campos, were still standing outside

45 the personnel office when they were approached by Jihan Kim. Campos testified that Jihan Kim addressed her and said, “Why are you going on strike? You don’t have a union anymore.” She testified that he seemed angry and upset. In response, Campos answered him, “We don’t have a contract, but have a union. All that you took, you’re going to pay back.” She indicated Jihan Kim was just “laughing” at the employees, “mak[ing] fun...and mock[ing] them.” That

50 conversation lasted approximately one minute.

Jihan Kim testified that he recalls that on February 1 “there was a lot of commotion that day” outside of Haena Kim’s office, with eight to ten housekeepers standing around. He claims that they said they were “not happy about the wage cuts” and were “not happy about being part of the Union.” Kim alleges that he said, “If you’re not happy about the Union, why do you support the Union?” According to Kim, no further conversation ensued.

In his post-hearing brief, counsel for the Respondent seemed to suggest that Jihan Kim should be credited over Campos because he is fluent in English and she is not. However, I certainly do not believe that proficiency in the English language is any basis upon which to judge credibility. Campos testified in both English and Spanish. Clearly, Spanish is her primary language, yet I was able to understand her when she was speaking English. Jihan Kim speaks English fluently, but indicated he does not speak Spanish. The two conversed only in English on February 1 outside the personnel office. I do not believe that there was any difficulty in Campos and Kim conversing in English during the conversation in question, and neither witness suggested otherwise.

For the reasons that I stated earlier, I did not find Jihan Kim to be a credible witness. Campos, on the other hand, seemed to me to be highly credible. She was certainly very emotional while testifying, seemingly close to tears on several occasions. Her testimony seemed very genuine and she spoke in a simple, direct way, without resort to exaggeration or embellishment. There is no question that as the union steward she was as much of a partisan as was Kim, the assistant to the Respondent’s president. However, I did not sense that she was allowing her personal feelings of loyalty to the Union to distort her testimony. What she said was inherently plausible and consistent with the other credible evidence of record. Certainly, as the union steward, she knew that the Union had not been responsible for the wage reduction, and, thus, would have been very unlikely to have expressed displeasure with the Union, as suggested by Kim. Accordingly, I credit her version of the conversation with Kim, to the extent there are variances.

I conclude that Jihan Kim did say to Campos and other assembled employees, “Why are you going on strike? You don’t have a union anymore.” His question about a strike constituted unlawful interrogation of union activity. While an employer may, under certain circumstances, make a limited inquiry as to employees’ strike intentions, so that it can make arrangements for potential replacements, there must first be a reasonable basis to fear an imminent strike. *Mosher Steel Co.*, 220 NLRB 336 (1976); *Industrial Towel & Uniform Service Co.*, 172 NLRB 2254 (1968). However, an employer cannot simply rely on unsubstantiated rumor or mere speculation of a strike in order to justify questioning employees about their intentions in the event of a strike. *Mosher Steel Co.*, *supra*; *W.A. Sheaffer Pen Co.*, 199 NLRB 242 (1972).

In the matter before me, there is no evidence that the employees were considering a strike, or that the Respondent’s managers were of such a belief. There has not even been a suggestion that there was such a rumor. Under such circumstances, the Respondent was not at liberty to question employees about whether they were going to strike. To do so certainly interfered with, restrained, and coerced the employees in the exercise of their Section 7 rights. Thus, Kim’s question about a strike directed to Campos and other bargaining unit employees constituted unlawful interrogation in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 24(a) and (33) of the first complaint.

Further, Kim’s statement that the employees no longer had a union was a statement of futility. Of course, the opposite was true. The Union was still the exclusive collective-bargaining representative of the unit employees. The Respondent’s unilateral implementation of its so-called last, best, and final offer did not change the Union’s representational status. For Kim to



have suggested otherwise was not only untrue, it was a disparagement of the Union, and constituted notice to the employees that any collective action was futile. As such, it interfered with, restrained, and coerced the employees in the exercise of their Section 7 rights. *Sprain Brook Manor Nursing Home*, 351 NLRB No. 75 (2007); *Goya Foods*, 347 NLRB No. 103, at \*18 (2006); *Basic Metal and Salvage Co.*, 322 NLRB 462, 463-464 (1996). Accordingly, Kim's statement that the employees did not have a union anymore constituted a violation of Section 8(a)(1) of the Act, as alleged in paragraphs 24(b) and (33) of the first complaint.

### C. Statement of Futility by Dana Taus

The parties stipulated that Dana Taus,<sup>31</sup> the Respondent's executive chef and director of food and beverage, was a supervisor and agent of the Respondent. It is alleged in paragraphs 25 and 33 of the first complaint that on about February 3, 2007, Dana Taus made a statement of futility regarding union representation by informing employees that they have no union, in violation of Section 8(a)(1) of the Act.

Gabriel Botello is employed by the Respondent as a dish washer. He testified on behalf of the General Counsel that in February 2007 he was called into Dana Taus' office. As Taus does not speak Spanish and Botello does not speak English, a fellow employee, a cook, who speaks both English and Spanish, was present to act as translator.

Counsel for the General Counsel attempted to ask Botello questions about what Taus said to him regarding the Union. The statement allegedly made by Taus was to be used in support of the allegation that Taus had made a statement of futility regarding the Union. However, counsel for the Respondent objected on the basis of hearsay, as any understanding by Botello of what Taus was saying came through the words of the employee translator. As the Spanish translation from the cook was being used to establish "the truth of the matter asserted," namely that the same words had been spoken by Taus in English, I precluded its admission as hearsay, and sustained counsel for the Respondent's objection.

However, I informed counsel for the General Counsel that I would permit the cook to testify regarding his translation of Taus' comments about the Union. Such testimony from the cook would not constitute hearsay, as he would be subject to cross examination regarding the words allegedly spoken by Taus and on his ability to translate those words from English into Spanish. Counsel for the General Counsel requested that she be given permission to call this witness (the cook/translator) out of turn, when the hearing next convened. I granted her request. However, when the hearing reconvened, counsel indicated that the witness, although previously indicating a willingness to testify, would apparently not be doing so. In fact, this individual did not testify.

The General Counsel has failed to meet her burden of proof regarding this allegation. Insufficient evidence was offered to establish that Taus made the statement attributed to him in the complaint. Therefore, I shall recommend that paragraph 25 of the first complaint be dismissed.

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<sup>31</sup> During the hearing, employee witnesses frequently referred to Dana Taus as Chef Dana.

#### D. Surveillance and/or Impression of Surveillance of Demonstrators

During February 2007, following the Respondent's unilateral implementation of portions of its so-called last, best, and final offer, members of the bargaining unit, along with their supporters, held a series of demonstrations (also referred to as protests or job actions) outside the front of the Hotel. From the undisputed record evidence, it appears that demonstrations were held on at least February 8, 10, 14, 15, 17, and 21, 2007.<sup>32</sup> It is alleged in paragraphs 20 and 33 of the first complaint that on various dates in February 2007, the Respondent engaged in surveillance or creating the impression of surveillance of its employees' union activity in violation of Section 8(a)(1) of the Act. The General Counsel contends that these acts of surveillance were committed in conjunction with the employees' participation in the February 2007 demonstrations mentioned above.

These demonstrations were held on the sidewalk in front of the Hotel, running along Wilshire Boulevard. According to Oscar Salazar, and various employee witnesses, on February 8, 2007, approximately 60-80 individuals participated in the protest, with 35-40 being bargaining unit members. The protest took place at noon so that employees on lunch break could participate, and lasted about an hour. The protests were organized by the Union and the demonstrators chanted and carried picket signs along Wilshire Boulevard in front of the Hotel. Some of the signs read: "UNITE HERE," "No Insurance at the Wilshire Plaza," "Unfair," and "We Want Justice."

Salazar testified that on February 8, 2007, during the demonstration, he observed Robbie Perez, Respondent's administrative assistant and an admitted supervisor and agent, standing across Wilshire Boulevard aiming a camera at the demonstrators. He also observed Dana Taus standing in the Hotel's driveway aiming a camera toward the demonstrators about six feet away. Both men continued to take pictures of the assembled protesters throughout the entire one hour period of the job action. Neither Taus nor Perez testified, and I will draw an adverse inference from their failure to do so. Salazar's testimony seemed credible, and as noted earlier, I found him to be so.

The Respondent does not really make much of an effort to challenge the witness testimony that its managers were actively photographing protesters during the demonstrations. In his post-hearing brief, counsel for the Respondent merely argues that there was no evidence offered to suggest that "senior management" was aware of the photography. However, I am at a loss to understand what difference that would make. Surveillance by its agents and supervisors binds the Respondent. Further, the individuals named by witnesses as having engaged in acts of surveillance seem to me to be highly placed managers. Counsel's argument is simply without merit.

On February 10, 2007, there were apparently two demonstrations, one at 7:30 am, and a second at about noon. Employee Jose Luis Campos, a waiter, participated in the noon job action. He testified that on that occasion there were approximately 40 demonstrators, of which about half were employees of the Hotel. For approximately 15-20 minutes, he observed Dana Taus standing in the entry way of the Hotel, 25 to 30 feet from the protesters, aiming his camera at them. Once again, Taus did not bother to rebut this testimony, and I have no reason to doubt Campos' version.

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<sup>32</sup> While there may well have been other demonstrations held on other dates in February, these appear to be those dates where agents of the Respondent are alleged to have engaged in acts of surveillance.

Kitchen worker Enrique Camberos testified that on February 14, 2007, he participated in a job action during his lunch break at noon. There were approximately 20-30 of the Respondent's employees participating in the demonstration. For about 20 minutes, Camberos  
 5 observed Dana Taus standing in the hotel driveway, facing the demonstrators, and taking pictures of them from a distance of about five feet. As Taus did not testify to rebut this accusation, I shall accept the testimony of Camberos, who seemed credible, as accurate.

The following day, February 15, 2007, employees again participated in a job action on the sidewalk in front of the Hotel at about noon. According to union representative Salazar,  
 10 there were a total of about 60-80 individuals participating, with approximately 30-40 being employees of the Respondent. Salazar noticed Dana Taus taking pictures of the demonstrators from the driveway of the Hotel. Robbie Perez was also present and pointing his camera in the direction of the demonstrators. Perez was standing near the "Tulips Garden"<sup>33</sup> sign in the front  
 15 of the Hotel. Salazar testified that both Perez and Taus aimed their cameras at the demonstrators throughout the hour-long protest. Once again, as neither Taus nor Perez testified, I will credit the testimony of Salazar.

According to Salazar, there was another demonstration in front of the Hotel on February 17, 2007, both in the morning at about 7:30 am and then again in the afternoon at about 5:00 pm. About 20-25 hotel employees participated in the morning session. During that session, Salazar observed Dana Taus, who was standing just inside the Hotel near the windows and glass door, pointing his camera toward the protesters. Also during the morning session,  
 20 Salazar observed Robbie Perez, who was located along the hotel driveway and also at both ends of the line of protestors at Normandie and Ardmore Streets,<sup>34</sup> aiming his camera at the protestors as they were walking in front of the Hotel. As neither Taus nor Perez rebutted this testimony, I will credit Salazar.  
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Another demonstration was held in front of the Hotel on February 21, 2007. Again, Taus and Perez were present and taking pictures. Salazar testified that he saw Perez on the driveway about six feet from the protestors, taking pictures of them. Taus was also standing near the driveway, about the same distance from the protestors, taking their pictures. As with all the other instances, no testimony was offered by Taus or Perez. As Salazar's testimony was not rebutted, I credit it.  
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A number of additional employee witnesses testified about their participation in demonstrations outside of the Hotel in February 2007, and of certain supervisors taking pictures of employees during those demonstrations. While these witnesses could not recall the specific dates in February 2007 when these events occurred, their collective testimony only supports the evidence that the Respondent's managers were actively engaged in photographing the demonstrators. Employee Noelia Elena Lopez, cafeteria attendant, testified that at a demonstration in February 2007, outside the Hotel, she observed Jihan Kim aiming a camera in the direction of the protestors, and Dana Taus doing the same thing. Similarly, employee Jeffrey Agerkop, a PBX operator, testified that at a demonstration in February 2007, outside the  
 40 Hotel, he observed Robbie Perez taking pictures of the protestors. As with all the other  
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<sup>33</sup> The "Tulips Garden" sign is prominently displayed above the sidewalk in front of the Hotel. (See photograph, G.C. Ex. 18a.)

<sup>34</sup> Wilshire Boulevard runs parallel to the Hotel, with Normandie and Ardmore Streets running perpendicular. The protestors walked back and forth along Wilshire between Normandie and Ardmore.  
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instances, neither Perez nor Taus testified to rebut these charges.<sup>35</sup> Jihan Kim did testify and denied taking any photographs of employees outside of the Hotel,<sup>36</sup> or of directing other supervisors to do so, or of seeing any of them doing so. However, for the reasons given earlier, I find Kim not to be credible. Accordingly, I accept the testimony of employees Lopez and Agerkop and conclude that Taus, Perez, and Kim were observed photographing employees during demonstrations in February 2007.<sup>37</sup>

As testified to by Salazar and a number of employee witnesses, there were at least six separate dates in February of 2007 when a number of admitted supervisors and agents of the Respondent photographed employees as they demonstrated on the sidewalk in front of the Hotel. These demonstrations were organized by the Union and were intended to protest the Respondent's unilateral implementation on February 1, 2007, of portions of its so-called last, best, and final offer. That implementation significantly reduced the wages of bargaining unit employees, eliminated the medical insurance coverage they had previously enjoyed under the expired Agreement, and made other changes in their terms and conditions of employment.

The evidence of the Respondent's managers repeatedly taking photographs of employee demonstrators is detailed, specific, and credible. The actions of Perez, Taus, and Jihan Kim in taking pictures of these employees occurred over significant periods of time on the various dates during which these employees protested. This conduct by the Respondent's managers was open and notorious.

It is beyond doubt that the protesting employees were engaged in both union and protected concerted activity when they were photographed by the Respondent's supervisors and agents. Board law is well established that while an employer's mere observation of public union activity on or near its property does not constitute unlawful surveillance, photographing such activity is unlawful because such pictorial recordkeeping tends to create fear among employees of future reprisals. *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997) *enfd.*, 157 F.3d 1268 (D.C. Cir. 1998); *F.W. Woolworth Co.*, 310 NLRB 1197 (1993). It has the tendency to interfere with, restrain, and coerce employees in the exercise of their right to engage in union and protected concerted activity.

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<sup>35</sup> Throughout this decision, I have drawn adverse inferences from the failure to testify of many of the Respondent's supervisors and agents alleged to have engaged in unfair labor practices. *Seda Specialty Packaging Corp.*, 324 NLRB 350, 351; *Grimmway Farms*, 314 NLRB 73, 76 fn. 2 (1994).

<sup>36</sup> Jihan Kim testified that he did photograph a number of individuals, whose identity he allegedly did not know at the time, and who had "trespassed" on the Respondent's property by entering the hotel lobby in mass on a date in late December or early January 2007. As the first complaint alleges in paragraph 20 that the unlawful acts of surveillance occurred in the month of February 2007, it appears that this incident is not being alleged as unlawful. Accordingly, I will not further consider it.

<sup>37</sup> As with all employee witnesses called by the General Counsel who testified while still employed by the Respondent, I conclude their testimony should be entitled to greater weight as they testified against their current employer's interest. Such testimony is particularly reliable. It is given at considerable risk of reprisals, and, thus, not likely to be false. See *Homer D. Bronson Co.*, 349 NLRB No. 50, at \*38 (2007); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961); *Earthgrains Co.*, 351 NLRB No. 45, at \*18 (2007), citing *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977).

As the Respondent does not even offer a justification for the actions of its managers, there can be no doubt that the Respondent's pervasive photographing of its employees engaged in legitimate Section 7 activity constituted unlawful surveillance and creating the impression of surveillance. Accordingly, I conclude that on multiple dates during the month of February 2007, the Respondent, by various agents, violated Section 8(a)(1) of the Act, as alleged in paragraphs 20 and 33 of the first complaint.

### **E. Change in the Lunch Break Policy for Kitchen Employees**

It is alleged in paragraphs 17, and its subparagraphs, 31, and 32 of the first complaint that the Respondent unilaterally changed the lunch break policy for its kitchen employees in violation of Section 8(a)(1) and (5) of the Act; and took that action as discriminatory retaliation against certain employees because of their union and protected concerted activity in violation of Section 8(a)(1) and (3) of the Act.

It is undisputed, and the parties stipulated, that prior to February 14, 2007, the Respondent's kitchen employees were permitted to take their 30-minute lunch break whenever time permitted between the hours of 11 am and 2 pm. (Jt. Ex. 1, par. 20(a).) Employee Juan Guardado, a cook, testified that he participated in the demonstrations on the sidewalk in front of the Hotel on February 10 and 14, 2007. In order to be available to participate in the demonstration on the 14<sup>th</sup>, Guardado took his lunch break at 12 noon. His break lasted for 30 minutes, after which he returned to work. Similarly, employee Enrique Camberos, a kitchen worker, participated in the February 14 demonstration at 12 noon while on his 30-minute lunch break. The following day, February 15, Camberos again participated in the demonstration in front of the Hotel at 12-noon, during his lunch break.

The parties stipulated that on February 15, 2007, the Respondent, by Alex Moon, the director of banquets, orally and by memorandum, changed the kitchen employees' lunch break policy by requiring that employees finish their lunch break by 12 noon unless otherwise authorized by a manager. (Jt. Ex. 15, par. 20(b); Jt Ex. 16). That memorandum, which is addressed to all food and beverage employees, from Moon states that failure to abide by it "will result in disciplinary action." Further, it shows on its face that copies had been sent to Leo Lee, Jihan Kim, and Dana Taus.

Camberos and Jose Luis Campos, a waiter, testified that on either February 15 or 16, 2007, between noon and 1:30 pm, Moon called 10-12 kitchen employees into the kitchen. Dana Taus was also present.<sup>38</sup> Moon informed the employees that they had to sign the lunch memo, which had apparently already been posted. However, a number of employees, including Camberos, Campos, and Guardado refused to sign. Both Taus and Moon warned the employees that if they continued to refuse to sign, they would be sent home. The employees continued to refuse to sign the memo, after which Taus and Moon left the kitchen for approximately five minutes. Upon returning to the kitchen, both Taus and Moon told the employees that as they would not sign the memo, they should leave and go home. But before they would leave, the employees asked for something in writing explaining why they were being sent home.

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<sup>38</sup> As neither Moon nor Taus testified, the events of that afternoon, as told by a number of employee witnesses, remains unrebutted.

Camberos spoke up and said that what the managers were doing constituted "labor related harassment." Taus responded, telling Camberos that "It was no harassment, [and] that Mr. Leo Lee didn't want any more union at that hotel." Taus and Moon then left the kitchen again for 2-3 minutes. When they returned, Moon told the employees to go back to work.  
 5 However, before they did so, Moon instructed Taus to take down everyone's name who had attended the meeting.

It is undisputed that before the issuance of the lunch memo on February 15, the kitchen employees were free to take their lunch break whenever they were available to do so between  
 10 11 am and 2 pm. However, since that date a number of these employees, including Camberos and Guardado, have taken their lunch break before 12 noon, so as to be in compliance with that memo.

According to the testimony of union representative Salazar, the Union only became  
 15 aware of this new lunch policy for kitchen employees when a group of workers contacted him. Salazar testified that the Respondent did not give the Union notice that it was going to implement this new policy, nor any opportunity to bargain over it.

The Respondent has proffered no defense against this allegation, other than to deny in  
 20 its answer that it violated the Act. In his post-hearing brief, counsel for the Respondent is silent concerning this issue. Also, as noted, Taus and Moon failed to testify. Accordingly, I am left to conclude that the incident occurred exactly as testified to by the employees, whose testimony was consistent with each other and seemed credible.

The evidence is uncontested that on February 15, 2007, Moon, orally and by memorandum, changed the kitchen employees' lunch break policy by requiring that they finish their lunch break by 12:00 noon. The Respondent made this change unilaterally and without notifying the Union or affording the Union an opportunity to bargain over the issue. This unilateral change in their lunch period clearly affected the kitchen employees' terms and  
 25 conditions of employment. *McCotter Motors Co.*, 291 NLRB 764, 769 (1988); see also  
 30 *McClatchy Newspapers Inc. d/b/a The Fresno Bee*, 339 NLRB 1214 (2003). As such, it constituted a violation of Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 17 and 31 of the first complaint; and I so find.

The General Counsel also alleges that the Respondent's establishment and issuance of this new lunch break policy violated Section 8(a)(3) of the Act. I agree. In assessing whether the Respondent's action violated Section 8(a)(3) of the Act, it is necessary to analyze the situation under the shifting analysis burden of *Wright Line, supra*. Under that standard, approved by the Supreme Court in *NLRB v. Transportation Corp., supra*, the General Counsel  
 35 must preliminarily establish a prima facie case sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a  
 40 preponderance of the evidence.

In the matter before me, the General Counsel has established that a number of the  
 45 kitchen workers were engaged in union activity, namely their gathering together with other bargaining unit members to hold demonstrations on the sidewalk in front of the Hotel in an effort to pressure the Respondent into reaching an agreement with the Union over the terms of a new collective-bargaining agreement. Union representative Salazar testified that a number of these demonstrations were held over the noon hour lunch period in order to give bargaining unit  
 50 employees who were at work on those days an opportunity to participate in the protest. A number of kitchen employees actively participated in these demonstrations during their lunch period, including Juan Guardado and Enrique Camberos. Clearly, the General Counsel has

established that the Respondent's supervisors and agents had knowledge that unit employees, specifically certain kitchen workers, were participating in the demonstration during their lunch period. In fact, certain supervisors engaged in surveillance, including by photography, of these and other employees while the employees were involved in their Section 7 activity.

The kitchen employees suffered an adverse employment action by having their lunch period changed from the previous period of between the hours of 11 am to 2 pm, as time permitted, to instead the more restrictive period of finishing lunch by no later than 12 noon. Most significantly, the General Counsel has established a link, or nexus, between the employees' protected activity and the adverse employment action, that being to restrict the kitchen employees' ability to participate in the lunch time demonstrations by effectively preventing them from taking their lunch breaks during the period of time the protests were scheduled at the noon hour.

Counsel for the General Counsel having established these elements, a presumption is created that the adverse employment action violated the Act. *Tracker Marine, LLC, supra*. The General Counsel having done so, the burden then shifts to the Respondent to show that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, supra*; *Farmer Bros. Co., supra*. Of course, the Respondent has offered no evidence as to why it changed the kitchen employees' lunch period. It has offered no legitimate reason for having done so. Accordingly, it has failed to rebut the General Counsel's *prima facie* case.

Further, by threatening the employees with being sent home,<sup>39</sup> a form of discipline, for refusing to sign this unlawfully issued memo, the Respondent, through Taus and Moon, was restraining and coercing the kitchen workers in their Section 7 right to engage in union and protected concerted activity, which constituted an independent violation of Section 8(a)(1) of the Act.<sup>40</sup> See *Air Contact Transport, Inc.*, 340 NLRB 688, 697 (2003); *Joe's Plastics*, 287 NLRB 210, 211 (1987); *Vought Corp.*, 273 NLRB 1290, 1295 fn.31 (1987).

Therefore, based on the above, I conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged in paragraphs 17 and 32 of the first complaint, and as described by the undersigned.

#### **F. Failure to Provide Vacation Pay**

Paragraphs 13 and 31 of the first complaint allege that the Respondent has failed and refused to provide four unit employees with their vacation pay in violation of Section 8(a)(1) and (5) of the Act. In the joint stipulation between the parties, all agreed that until at least January 31, 2007,<sup>41</sup> the collective-bargaining agreement (the Agreement) between the Union and the Respondent provided for employees to receive annual vacations with pay of one to four weeks, depending upon the employee's years of service with the Respondent. Further, the stipulation provides that the following four unit employees were not paid for the vacations they

<sup>39</sup> Presumably, "being sent home" meant without pay.

<sup>40</sup> While the complaint does not specifically allege this independent violation of Section 8(a)(1) of the Act, the underlying issue was raised and fully litigated at the hearing, and I believe the resolution of the issue does not abridge the Respondent's right to due process or prejudice it. (See cases cited above in footnote 23.)

<sup>41</sup> This is the day before the Respondent unilaterally implemented its so called last, best, and final offer.

took during the enumerated time periods: (1) Irma Mendez, November 15-December 15, 2006; (2) Maria Carrillo, December 18-31, 2006; (3) Teresa Martinez, February 19-March 9, 2007; and (3) Brenda Cabrera, March 2-6, 2007. (Jt. Ex. 1, par. 16.)

5           The Agreement provides, under Section 6(A), that employees are entitled to one to four weeks of paid vacation depending on their length of service. The Agreement expired on December 24, 2006. However, the right to receive vacation pay is one of the provisions that generally survive contract expiration. *Sage Development Co.*, 301 NLRB 1173, 1178 (1991); *Finger Lakes Plumbing Co.*, 253 NLRB 406 (1980); *High-Grade Materials Co.*, 239 NLRB 947, 956 (1978).

10           Union representative Salazar testified that the Union was never informed by the Respondent that it was going to cease making vacation payments to employees, nor was there any request by the Respondent to bargain over its intention to cease making vacation payments. As noted, the parties stipulated that for the four employees named in the stipulation, they were not paid for their vacations taken during the time periods enumerated.

15           The Respondent offers no defense to this allegation. Counsel for the Respondent's post-hearing brief is silent as to this matter. However, during his testimony, the Employer's president, Leo Lee, testified that he learned in September of 2007 that the employees had not been paid for their vacation time. According to Lee, when he learned at a meeting attended by housekeeping employees that certain employees had not received their vacation pay under the terms of the expired contract, he ordered his staff to issue the appropriate payroll checks to those employees. Lee indicated that those employees have now been paid. In any event, he denied ever instructing that employees should not be paid for the vacations they had taken under the terms of the expired Agreement.

20           Whether the four employees in question were finally paid for their vacations by some date in September of 2007, there is no dispute that for a significant period of time they had not been paid. For a period of between six and nine months, the four employees listed above were without compensation for their vacations. As the Respondent has offered no defense to this allegation, I must conclude, based on Salazar's testimony, that the Respondent unilaterally changed the terms and conditions of the Agreement by discontinuing the disbursement of vacation pay, without informing the Union of its intention or offering to bargain with the Union regarding this issue. I find that this conduct by the Respondent constitutes a violation of Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 13 and 32 of the first complaint.

### **G. Falsely Blaming the Union**

25           The second complaint<sup>42</sup> alleges in paragraphs 8(a) and 11 that on about July 27, 2007, the Respondent, through Haena Kim, violated Section 8(a)(1) of the Act by informing employees that their wages had been reduced because of the Union. It is the General Counsel's contention, as argued in her post-hearing brief, that this claim by Haena Kim falsely blamed the Union for the Employer's adverse action in reducing employee wages. The Respondent's counsel did not address this allegation in his post-hearing brief, and Haena Kim did not testify. Accordingly, the evidence offered by the General Counsel in support of this allegation was un rebutted.

50           <sup>42</sup> All the remaining unfair labor practice allegations discussed in this decision are raised by the General Counsel in the second complaint.



Lester Salazar is a room service waiter employed by the Respondent. He testified that on July 27, 2007, he noticed, apparently for the first time, that his hourly wages had been reduced. Salazar then went to the human resource office where he spoke with Haena Kim, the Respondent's director of human resources. He complained to her that his hourly wage had been reduced. Kim informed him that since February 1, 2007, his paycheck had been a "mistake."<sup>43</sup> Salazar testified that he asked Kim why the mistake had taken this long to discover, to which he alleges Kim responded, "It was a union law." He claims that she repeated that statement three or four times.

While the statement, "It was a union law," is somewhat ambiguous, and any person knowledgeable about labor law and collective-bargaining issues would likely conclude that the statement really made no sense, Salazar was apparently uneducated and uninformed about such matters. To him, Kim's statement seemed to place the blame for his wages suddenly being reduced on the Union, his collective-bargaining representative. I conclude that it would have been reasonable for Salazar, who was not educated in such matters, to have drawn such a conclusion.

According to Salazar, while he and Kim were having their conversation, a cafeteria worker named Noelia<sup>44</sup> walked by and stopped at the time clock. When Kim left, Noelia walked up to Salazar and asked him what was wrong. Salazar testified that he responded that his wages had been reduced to \$7.55 per hour. Further, Salazar told Noelia that the reason he had been given by Kim for the reduction was because there was a "union law."

Salazar testified that at about that time Kim walked out of her office and told Salazar "not to talk with Noelia" because "Noelia was still on the clock." According to Salazar, Noelia responded that she was no longer on the clock. However, Salazar claims that Kim was unpersuaded and replied that he should "still" not talk with her, and that he should "get out." That allegedly ended the conversation.

The Board has held that an employer "violates Section 8(a)(1) when it takes adverse action against employees and falsely blames its actions on the union." *Webco Industries, Inc.*, 327 NLRB 172, 173 (1998). According to the Board, such conduct violates the Act because it "coercively suggests to employees that seeking union representation results in damage to their terms and conditions of employment." *Id.*

In the case at hand, the Respondent unilaterally implemented a wage reduction for its employees on February 1, 2007, pursuant to its so-called last, best, and final offer. Subsequently, Haena Kim had her conversation with Lester Salazar in which she falsely blamed the Union for his wage reduction. That conduct is a violation of Section 8(a)(1) of the Act, as alleged in paragraphs 8(a) and 11 of the second complaint; and I so find.

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<sup>43</sup> While not specifically testified to by Salazar, I will assume, based on other evidence of record, that what Kim was referring to as having happened in February of 2007 was the Respondent's unilateral implementation of portions of its so-called last, best, and final offer. That implementation included significant wage reductions for bargaining unit employees that went into effect on February 1. For what ever reason, Salazar's wages had not been reduced when his fellow employees' wages were cut. Apparently, this error or oversight was corrected by the Respondent beginning with Salazar's paycheck of July 27, 2007.

<sup>44</sup> Lester Salazar did not give a last name for Noelia, and I am uncertain as to whether she is Noelia Elena Lopez, a cafeteria attendant, who testified at the hearing.

## H. Prohibiting Employees from Speaking with Each Other

It is alleged in paragraphs 8(b) and 11 of the second complaint that the Respondent, through Haena Kim, prohibited employees from speaking to each other concerning their terms and conditions of employment. The substance of this conversation is described in detail in the section immediately above. As noted, Haena Kim informed Lester Salazar “not to talk with Noelia,” while they were engaged in a conversation regarding the reduction in Salazar’s wage rate. Kim repeated that prohibition even after being informed by Noelia that she was no longer on the clock. Kim punctuated her warning to Salazar by telling him to “get out,” which he did. Since Kim failed to testify and the Respondent offered no defense to this allegation, I accept the testimony of Lester Salazar as credible.

It is well settled Board law that “[u]nder Section 7 of the Act, employees have the right to engaged in activity for their ‘mutual aid or protection,’ including communicating regarding their terms and conditions of employment.” *Easter Seals Connecticut, Inc.*, 345 NLRB No. 52, at \*3 (2005), citing *Kinder-Care Learning Center*, 299 NLRB 1171 (1990), citing *Eastex, Inc., v. NLRB*, 437 U.S. 556 (1978). Further, it has been held to constitute a violation of Section 8(a)(1) of the Act for an employer to threaten an employee with unspecified reprisals in response to her speaking with other employees about the employees’ “wages,” categorized as a “key objective of organizational activity.” *St. Margaret Mercy Health Center*, 350 NLRB No. 20 at \*3 (2007), citing *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 537 (6<sup>th</sup> Cir. 2000), enfg. *Main Street Terrace Care Center*, 327 NLRB 522 (1999).

In the matter before me, two employees were discussing a wage reduction and the reason given by a supervisor and agent of the Respondent for that reduction. This subject matter goes to the heart of what is meant by a term and condition of employment. In ordering these two employees to cease having such a conversation, Haena Kim was clearly interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. Accordingly, I find that by this conduct the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraphs 8(b) and 11 of the second complaint.

## I. Leo Lee’s Meeting with Employees on September 7 and 18, 2007

The General Counsel alleges in the second complaint, paragraphs 7 and 10, that Leo Lee met with unit employees in the employee cafeteria on September 7 and 18, 2007, and that in the course of doing so bypassed the Union and dealt directly with its unit employees in violation of Section 8(a)(1) and (5) of the Act. Further, in paragraphs 9, and its subparagraphs, and 11 of the second complaint, the General Counsel alleges that during these two meetings Lee, by various actions and statements, interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

In supporting these allegations, counsel for the General Counsel relies primarily on the testimony of three employee witnesses, Lester Salazar, Noelia Elena Lopez, and Griselda Campos. In defending against these charges, the Respondent offered the testimony of its president, Leo Lee, and his assistant, Jihan Kim. In his post-hearing brief, counsel for the Respondent argues that the undersigned should credit the testimony of Lee and Kim and not that of the employees.

Earlier in this decision I indicated in detail my reasons for discrediting both Lee and Kim. For the reasons expressed therein, I continue to find Lee and Kim incredible. On the other hand, I found the testimony of the above three named employees to be genuine, candid, and straight forward. They seemed to testify without guile, exaggeration, or embellishment. Further,

for the most part, their testimony supported each other and was inherently consistent with the other credible evidence of record. Regarding the two meetings in question and the alleged statements of Lee attributed to him by Salazar, Lopez, and Campos, their testimony had the “ring of authenticity” to it. Finally, I am mindful of, and in agreement with, that line of cases that generally hold that employee witnesses who testify adversely to their current employer are likely more credible than not, as they risk significant pecuniary damage in testifying against their employer. See *Flexsteel Industries, Inc.*, *supra*; *Gold Standard Enterprises*, *supra*; *Federal Stainless Sink Div. of Unarco*, *supra*; *Georgia Rug Mills*, *supra*.

Also, I am not persuaded otherwise by counsel for the Respondent’s argument that as Lee spoke to these employees in English, their lack of proficiency in English should be resolved against them since an interpreter was used who could have made mistakes in translating Lee’s comments into Spanish, the native language of the three employees. From my observation of the employees in question during the hearing, it was apparent that while Spanish was certainly their best language, each of them understood and could communicate in basic English. Further, as the party suggesting that the interpreters used at the meetings were inadequate, the Respondent has the burden of proffering evidence to support that claim. No such evidence was forthcoming. Considering that these two meetings were called by the Respondent during company time and presumably the employee interpreters were selected by the Respondent’s managers, the Respondent would be hard pressed to now offer evidence to establish that it had made a bad selection.

Accordingly, where ever Kim’s or Lee’s testimony is at variance with that of Campos, Salazar, or Lopez, I will credit the testimony of the employees over that of the two supervisors. There are many such variances.<sup>45</sup>

### 1. The Meeting of September 7, 2007

The Respondent’s president, Leo Lee, called a meeting of housekeeping employees for September 7, 2007, to begin about 4:00 pm in the employee cafeteria.<sup>46</sup> There were about 15-20 employees in attendance, plus a number of managers, including Lee, Haena Kim, Jihan Kim, and others. Only Lee and Jihan Kim testified at the hearing on behalf of the Respondent. Lee conducted the meeting, which lasted approximately one hour and 15 minutes.

Lee spoke in English. Initially, David, an employee from housekeeping, translated Lee’s remarks into Spanish, but within ten minutes Lester Salazar, a room service waiter, took over the translating duties. Lee began the meeting by saying that the housekeeping supervisor had asked him to hold this meeting, and that if employees had any questions, they should ask him, because he was there to answer them. An employee asked why he had lowered employee wages and why the employees no longer had insurance. According to Lester Salazar, Lee responded that it was because he did not like the Union. The same employee mentioned to Lee that she had sick children and needed Lee to report her hours of work to the Trust Fund so that she could qualify for medical insurance. According to Griselda Campos, Lee said that he would send a letter to Kaiser (the Fund’s insurance carrier) to regain the insurance coverage for the

<sup>45</sup> As the testimony of employees Salazar, Campos, and Lopez was, for the most part, corroborative of each other, I will note the events of the two employee meetings without always indicating which employee witness was so testifying.

<sup>46</sup> While there may have been employees assigned to other departments present, the attendees for both the September 7 and 18, 2007 meeting were primarily from the housekeeping department.

complaining employee. Lee added that he would pay each employee who purchased medical insurance a reimbursement of up to \$125, if the employee would bring in a receipt for the purchase.<sup>47</sup>

5 During the meeting, Campos asked why some housekeepers were paid \$7.55 per hour and others were paid \$8.05 per hour. Lee responded that it was due to classifications, but that he was going to bring the matter to the attention of his attorney to see whether he could pay everyone \$8.05 per hour.

10 Salazar testified that another employee complained about not being paid for her vacation time. Lee said that she would be paid for her vacation at her old salary, even if he had to pay her out of his own account. Then, according to Campos, Lee said that the Union cost him too much money. He said that the Union had cost him \$60,000, and that he could no longer afford it. He also mentioned that the Union cost him \$3.54 per hour for each employee. Lee offered  
15 the employees \$2,000 to be used to investigate the Union. According to Campos, when Lee said this he patted the right side of his hip.

One of the employees, Eriberto, spoke up and asked Lee how much he was willing to pay the employees, and whether he would give them medical insurance, vacation and holiday pay. Lee responded that he would be speaking with his attorney. But, without the Union, he would bring everything back to normal, including the former wages, paid vacations, and full insurance benefits. Further, he told them that he would be able to give them all of this, including health insurance, vacations, and holidays, but that the employees would have to send a letter to the Union "renouncing" it.

25 According to Lopez, Lee reiterated that he did not want a union at the Hotel. He said that it was costing him too much money and that five or ten years could pass, and he would still not want a union. Campos testified that she spoke up and said that the employees wanted a union. She told him that with the Union they had employment protection, eight paid holidays, three week vacations, and medical insurance. However, this apparently was not what Lee  
30 wanted to hear, because he said that if he did not reach an agreement with the Union he would turn the Hotel into condos.

Salazar testified that toward the end of the meeting, an employee named Rita asked Lee  
35 if without the Union he would return the money that had been taken from the employees since February 1, 2007. Lee responded that he would do so, even if he had to pay it back from his own account, little by little through payroll checks. That concluded the meeting of September 7.

## 2. The Meeting of September 18, 2007

40 Leo Lee's follow up meeting with the housekeeping employees was held on September 18, 2007, again in the cafeteria at about 4:00 pm. There were approximately 15 employees present, along with Lee, Jihan Kim, and others managers. Initially, Lester Salazar was used to translate Lee's comments into Spanish, but after a short time, a woman described  
45 as Korean, whose name is unknown, was asked to translate in place of Salazar.

50 <sup>47</sup> While not specifically stated, I assume that this reimbursement was meant to be for up to \$125 per month.

Lee began the meeting by telling employees that he had spoken to his attorney and now had the answers to the employees' questions. Lee said that all the housekeeping employees would now be paid \$8.05 per hour. Additionally, they would be receiving five paid holidays, and those owed vacation pay under the old wage rate would be receiving that amount. Further, he would be writing a letter to the Trust Fund for the employee who had companied about not being able to provide medical care for her sick children, so that the Fund was aware of the number of hours she had worked. He indicated that he would be doing the same for other employees as well.<sup>48</sup>

Lee said that he had spoken with his lawyer and he would be able to pay \$11 an hour, provide insurance coverage, paid holidays, and a raise every three months, but employees would first have to individually go to the union office and "renounce" the Union. All three employee witnesses who testified indicated that Lee said essentially the same thing, and all three insisted that Lee specifically used the word "renounce." Both Lee and Jihan Kim denied any such reference and denied Lee ever used the word "renounce." However, for the reasons previously given, I continue to credit the testimony of the three employees over that of Lee and Kim. The two managers' bare denials are unbelievable when confronted by the detailed and generally consistent testimony of Salazar, Campos, and Lopez.

According to the testimony of Lopez, Lee specifically answered Eriberto's question from the first meeting and indicated that if Eriberto "renounced the Union," he would be paid what he had previously earned, along with his previous vacation and health insurance benefits. Near the end of the meeting employee Roberto Gamez spoke up and asked Lee why he didn't just try negotiating with the Union, as the Hotel had lost business to other hotels because of the dispute with the Union. Lee answered that he did not want a union at the Hotel, and the Union did not bring any business to the Hotel. Both Salazar and Campos indicated that Lee repeated several times that he did not want a union at the Hotel, and each time that he said so he would pass his hands, one over the other, in a gesture that the undersigned would describe as meaning Lee's relationship with the Union was over. That concluded Lee's second meeting with the housekeeping employees.

### 3. Direct Dealing with Employees

It is the General Counsel's position that Lee, by conducting the meetings of September 7 and 18, unlawfully bypassed the Union and engaged in direct dealing with employees in violation of Section 8(a)(1) and (5) of the Act. Lee denied most of the statements attributed to him by Salazar, Campos, and Lopez, in particular those dealing with the Union or his feelings about the Union. While I have discredited those denials, even Lee acknowledged that he called and conducted both meetings because he had been told that housekeeping employees wanted to have him answer certain questions. He admitted writing down the questions they wanted answered, which questions involved issues of wages, holidays, vacation, and health insurance. Further, Lee freely admitted that he informed the employees on September 7 that he would discuss their concerns with his attorney and get back to them with answers as soon as he could.

Progressing to the second meeting on September 18, Lee admitted that he came back with answers to the questions asked by employees at the first meeting. He admitted telling the employees that all housekeepers would now be making \$8.05 per hour; four employees who

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<sup>48</sup> Frankly, I am unclear as to what good Lee thought it would be to report to the Fund the number of hours worked by employees. The Respondent had stopped making payments to the Fund on behalf of employees and that was the reason the employees were being denied insurance coverage.

had not received any vacation pay would now be paid; employees would be reimbursed up to \$125 if they produced a receipt for medical insurance; and he would be providing the complaining employees with proof of the number of hours worked so that they might have the Trust Fund credit them with those hours for medical insurance purposes.

Further, Lee contends that when at the second meeting employees told him that they no longer liked the Union, that he merely informed them that in that event they could tell the Union how they felt, and that they no longer wanted the Union to represent them. Of course, when on cross-examination Lee was asked specifically who had expressed their displeasure with the Union, he could not recall anyone by name. I found such responses from Lee to be particularly self serving, and I am not at all convinced that any employees expressed unsolicited displeasure with the Union. On the other hand, I think it much more likely that, as testified to by the employee witnesses, Lee used the two meetings as occasions to denigrate the Union and indicate his displeasure with the Union, and his intent to reward the employees if they rejected the Union.

In determining whether an employer has engaged in direct dealing with employees in violation of Section 8(a)(5) of the Act, the Board has set forth a number of criteria to be applied. These criteria enumerated in *Southern California Gas Co.*, 316 NLRB 979 (1995) are as follows: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. See also *Permanente Medical Group*, 332 NLRB 1143 (2000); *James Heavy Equipment Specialists, Inc.*, 327 NLRB 910 (1999).

Based on the above criteria, there is no doubt that the Respondent's president engaged in direct dealing with employees at the meetings he held on September 7 and 18. Lee communicated directly with bargaining unit employees regarding their complaints over wages, insurance, vacations, holidays, and other terms and conditions of employment, and his efforts to ameliorate those complaints. These meetings were held specifically to the exclusion of the Union, where Lee engaged in a very deliberate and unsubtle attempt to provide the employees with a better deal than the Respondent had offered to the Union during negotiations. Not only were those efforts intended to undercut the Union's position as bargaining unit representative, but Lee also attempted to do so even more directly, through his statements disparaging the Union.

Lee admitted telling the employees at the first meeting that he would be taking their problems to his attorney for discussion, and that he would be getting back to them with a decision as to whether the Respondent could satisfy their needs. He did just that when at the second meeting he informed them that the Respondent would, among other improvements in their wages and working conditions, be giving all housekeepers the higher pay of \$8.05 and providing paid vacations and medical insurance.

Based on the credible testimony of employee witnesses Salazar, Campos, and Lopez, as well as direct admissions by Lee himself, there is no doubt that Lee engaged in blatant direct dealing with members of the bargaining unit. See *Southern California Gas Co.*, *supra*; *Permanente Medical Group*, *supra*; *James Henry Equipment*, *supra*. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 7 and 10 of the second complaint.

#### 4. Lee's Other Unlawful Conduct at the September Meetings

It is the position of the General Counsel that not only did Lee engage in direct dealing with employees on September 7 and 18, 2007, but, through his statements on those dates, the Respondent also engaged in numerous independent violations of Section 8(a)(1) of the Act, as alleged in paragraphs 9(a-j) and 11 of the second complaint.

Paragraph 9(a) of the second complaint: Lester Salazar testified that at the meeting of September 7, 2007, fellow employee Teresa Martinez asked Lee what the reason was for lowering wages and discontinuing the medical insurance coverage. According to Salazar, Lee responded by saying that he did not like the Union. For the reasons noted earlier, I credit Salazar and believe that Lee made the statement attributed to him, which statement essentially placed the blame on the Union for the Respondent's decision to reduce or eliminate its employees' wages and benefits. Such statements restrain and coerce employees in the exercise of their Section 7 rights. *Webco Industries*, 327 NLRB 172 (1998). Accordingly, I conclude that by Lee's statement the Respondent has violated Section 8(a)(1) of the Act.

Paragraph 9(b) of the second complaint: Griselda Campos, who I have credited, testified that at the September 7 meeting Lee stated that he did not want a union, and he asked her why she wanted a union. That elicited a response from Campos, the union steward, as to the value of having a union. In any event, Lee's question constituted the unlawful interrogation of Campos. While she was a known union supporter and steward, asking her such a question at a meeting called by Lee, the Respondent's president, on company time and with her fellow housekeepers present could only have been intended to embarrass her, and to restrain and coerce her in the exercise of her right to support the Union. *Mickey's Linen & Towel Supply*, 349 NLRB No. 76 (2007); *Pan-Oston Co.*, 336 NLRB 305 (2001); *Rossmore House*, *supra*. As such, I conclude that by Lee's statement the Respondent has violated Section 8(a)(1) of the Act.

Paragraph 9(c) of the second complaint: Both employees Campos and Noelia Elana Lopez, who I have also found to be credible, testified that at the meeting of September 7, Lee made a number of disparaging remarks about the Union, after which he stated that he would "give [anyone] \$2,000 out of [his] own pocket [to] investigate the Union." He made this statement while "patting the right side of [his] hip." Offering to pay employees a monetary reward for investigating Lee's allegations disparaging the Union restrains and coerces employees in the exercise of their Section 7 rights. *Cf. Naomi Knitting Plant*, 328 NLRB 1279 (1999); *Williamhouse of California*, 317 NLRB 699 (1995). Therefore, I find that by Lee's statement, the Respondent has violated Section 8(a)(1) of the Act.

Paragraph 9(d) of the second complaint: As I have previously found, Lee informed the employees assembled at the two meetings that they could secure their previous wages and benefits if they would simply "renounce" the Union. In connection with those statements, he repeated a number of times that he did not want the Union, and that five or ten years would pass and he would still not want the Union. Campos and Lopez testified that he made those statements at the September 7 meeting. Employees Salazar and Campos reported similar statements being made by Lee at the meeting on September 18, along with hand and arm gestures signifying "no more," as he said that he did not want the Union.

While Section 8(c) of the Act gives the Respondent's managers the right to express their opinion that they do want the Union in the facility, Lee crosses the line into restraint and coercion when he links not wanting the Union with a promise to return the wages and benefits formerly enjoyed by the employees if they will "renounce" the Union. Such combined statements in the context of these meetings were designed to demonstrate to the assembled

employees the futility of their continuing support for the Union. This conduct violates Section 8(a)(1) of the Act. *Goya Foods* 347 NLRB No. 103 (2006); *Basic Metal and Salvage Co.*, 322 NLRB 462, 463 (1996).

Paragraph 9(e) of the second complaint: After reviewing the conduct and actions of the Respondent's managers before, during, and after the negotiations on a new collective-bargaining agreement, I agree with the General Counsel's contention that Lee called the meetings of September 7 and 18 with the intention of soliciting employee grievances and making promises to remedy those grievances in an effort to undermine support for the Union. The Employer's entire course of conduct seemed designed to achieve such a purpose. However, even for this Respondent, the actions of Lee at the two employee meetings seem rather transparent and brazen.

Lee began the meeting of September 7 by specifically saying that he was there to answer the employees' questions, and then asking for questions. While the two meetings were filled with statements by Lee promising to resolve various problems, I will only mention the most obvious. After hearing complaints about the elimination of the employees' medical insurance, Lee promised to send letters to the Funds to accurately reflect the hours worked by employees, and to pay \$125 per month to any employee privately purchasing insurance and providing proof of such. Upon receiving a complaint about housekeepers earning two different hourly wages, Lee promised to discuss the issue with his lawyer, and then at the second meeting informed the employees that they would now all be receiving the higher wage rate of \$8.05 per hour. When questioned at the first meeting by an employee who had not received her vacation pay under the terms of the expired contract, Lee agreed to pay her, even if the money came out of his personal account. As noted above in detail, Lee made it clear before the end of the meeting of September 7 that without the Union he would make things right by restoring the wages, vacations, and insurance benefits previously provided.

Continuing with his design to demonstrate to the employees how reasonable he could be if only the employees would abandon the Union, Lee started the second meeting on September 18 by informing the employees that he had spoken to his lawyer regarding their concerns, and he had those answers. Both employees Campos and Lopez testified credibly that Lee offered to return their former benefits including wages, insurance, and holidays, and to pay them a raise every three months, as long as they would "renounce" their support for the Union. As mentioned, he also informed them that effective immediately they would all be receiving the higher housekeeper pay rate.

Board law is clear and of long standing that an employer that solicits employee complaints, and promises to remedy them in return for the employees' abandonment of their union is in violation of the Act. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1090 (2004); *County Window Cleaning Co.*, 328 NLRB 190, 196 (1999); *Orbit Lightspeed Courier Systems, Inc.*, 323 NLRB 380, 390 (1997); *Crest Ambulance*, 320 NLRB 800, 801 (1996). I believe this is what the Respondent, through its president, Lee, was doing on September 7 and 18, and, therefore, I find that by these actions the Respondent has violated Section 8(a)(1) of the Act.

Paragraph 9(f) of the second complaint: Concomitant with the last finding, I am of the view that Lee's comments that he would pay back money lost by the employees if they would "renounce" the Union was a violation of the Act. As noted earlier, Lee indicated through several different statements that if the employees would "renounce" the Union he would restore their previous wages and benefits. Employee Lester Salazar credibly testified that as the first meeting was ending, an employee identified as Rita asked if there was no union at the Hotel,



would he return the monies that had been taken away from the employees since February 1. By this question, she was obviously referring to the reduction in wages unilaterally implemented by the Employer pursuant to its so called last, best, and final offer. Lee was unambiguous, telling Rita that he would pay the money back, if necessary, by using his own funds. As eight months had passed since the Respondent had significantly reduced employee wages on February 1, the undersigned will assume the amount of "back wages" would have been very substantial.

Thus, by specifically promising employees to pay them a sum of money in the form of back pay in return for their abandonment of the Union, the Respondent was restraining and coercing employees in the exercise of their Section 7 rights. I find such conduct to constitute a violation of Section 8(a)(1) of the Act. *Jewish Home for the Elderly of Fairfield County, supra*; *Orbit Lightspeed Courier System, Inc., supra*; *Crest Ambulance, supra*.

Paragraph 9(g) of the second complaint: Similar to that allegation immediately above is the contention that Lee promised to reimburse employees \$125 per month for health insurance costs, so long as they could produce a receipt. These were desperate employees, without the health insurance that they had enjoyed under the terms of the expired contract. Lee understood their desperation, having been apprised of it by the employees themselves. In his testimony he admitted what the employees' had been testifying to, namely his offer to reimburse them for purchasing insurance. Of course, the *quid pro quo* for Lee's generosity was the employees having to "renounce" the Union.

This statement by Lee is simply another in a long line of unlawful promises of benefit designed to restrain and coerce the employees in order to get them to abandon the Union. *Gerig's Dump Trucking*, 320 NLRB 1017, 1022 (1996); *Pennsy Supply*, 295 NLRB 324, 325 (1989). As such, it constitutes a violation of Section 8(a)(1) of the Act; and I so find.

Paragraph 9(h) of the second complaint: In this paragraph, the General Counsel alleges that Lee's offer to provide various benefits to the unit employees in return for their "renouncing" the Union constituted a separate violation of the Act. As I have already found, Lee made a series of promises to the housekeepers on September 7 and 18 offering among other things: to return their former wages, vacations and medical insurance; pay them \$11 per hour, with raises every three months, and give them insurance and paid holidays. Lee essentially mentioned the same benefits in slightly different form several times at both meetings. While it is somewhat difficult to distinguish between the various promises, repeated several times, it is clear that in return for these improved wages and benefits, Lee was insisting that the employees "renounced" the Union. To the extent that this is a separate incident, Lee's promises to the employees contingent on their renouncing the Union constituted a violation of Section 8(a)(1) of the Act; and I so find. *Sprain Brook Manor Nursing Home*, 351 NLRB No. 75 (2007); *Crest Ambulance*, 320 NLRB 800 (1996); *Basic Metal and Salvage*, 322 NLRB 462 (1996).

Paragraph 9(i) of the second complaint: The General Counsel contends that Lee threatened the assembled employees at the September 7, 2007 meeting with adverse consequences because of their support for the Union, specifically that he would turn the hotel into apartments or condos. Employees Griselda Campos and Noelia Elena Lopez both credibly testified that at the first employee meeting Lee said that if he could not reach an agreement with the Union that he would turn the Hotel into apartments or condos. The clear implication from Lee's statement was that if he continued to have problems with the Union, he would cease operating the property as a hotel, thereby eliminating the employees' jobs. In my view, this was not a subtle threat, but, rather, one all the employees could understand, and designed to make them fearful that continued support for the Union could result in being unemployed.

The threat made by Lee to convert the Hotel into apartments or condos would certainly interfere with, restrain, and coerce the employees in the exercise of their Section 7 rights. *Volt Technical*, 176 NLRB 832, 835 (1969). Accordingly, I conclude that the Respondent, through Lee, has violated Section 8(a)(1) of the Act.

Paragraph 9(j) of the second complaint: It is alleged that Lee's act of instructing the employees to submit a letter to the Union renouncing their union membership is a separate violation of the Act. Once again, employees Campos and Lopez testified that at the September 7, 2007 meeting Lee promised the assembled employees increased wages and benefits, specifically in return for individuals preparing letters to the Union, renouncing the Union and withdrawing from it. There could hardly be a more obvious act interfering with the Section 7 rights of the bargaining unit employees than for Lee to have directed them to abandon the Union and to so notify the Union in writing. *Marchese Metal*, 270 NLRB 293, 298 (1984); *Country Window Cleaning*, 328 NLRB 190 (1999); *Crest Ambulance*, 320 NLRB 800 (1996). Accordingly, I find that by this action the Respondent has violated Section 8(a)(1) of the Act.

### Conclusions of Law

1. The Respondent, Majestic Towers, Inc. d/b/a Wilshire Plaza Hotel, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Unite Here Local 11, Unite Here! International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(5) and (1) of the Act:

(a) Failing to deduct monthly union dues and to remit those dues, along with related union dues information, to the Union, as provided for in the Agreement between the Employer and the Union;

(b) Failing to make the required contributions to the Health and Welfare and Retirement Funds, along with related contribution reports, as provided for in the Agreement between the Employer and the Union;

(c) Failing to process a grievance filed under the terms of the Agreement between the Employer and the Union by refusing to furnish the Union with requested written information necessary to support the grievance;

(d) Denying the Union's agents access to the Hotel as provided for in the Agreement between the Employer and the Union by threatening to call the police, by summoning the police, and by orally revoking access;

(e) Failing to furnish the Union with requested information necessary for the Union's performance of its collective-bargaining duties including: detailed calculations of the cost of the Employer's economic proposals made during negotiations, information concerning the lawsuit instituted by Radisson Hotels International against the Employer, information concerning the differences in the wage rates between the housekeeping and cook classifications; and a list of all unit employees, their names, job titles, and wage rates;

(f) Failing to pay the unit employees their vacation pay as provided for in the Agreement between the Employer and the Union;

(g) Declaring that the parties were at an impasse in their collective-bargaining negotiations;

(h) Unilaterally abrogating the terms and conditions of employment under which its bargaining unit employees had been employed pursuant to the terms of the Agreement between the Employer and the Union;

(i) Unilaterally implementing, without the parties having reached impasse, the proposals contained in the Employer's so called last, best, and final offer;

(j) Unilaterally eliminating the daytime shift in the lobby bar;

(k) Unilaterally implementing an employee locker inspection policy;

(l) Unilaterally implementing a kitchen employees' lunch break policy; and

(m) Dealing directly with bargaining unit employees and, thereby, bypassing the Union, as the collective-bargaining representative of those employees.

4. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) Informing, orally and in writing, employees Griselda Campos, Susana Serrano, Ofelia Calderon, and Maria Carrillo that they were selected for random locker inspections and by subsequently performing said inspections; and

(b) Informing, orally and in writing, kitchen employees of a change in their lunch break policy, and by changing said policy.

5. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by following and observing union representatives as they walked through the Hotel in an effort to contact members of the bargaining unit;

(b) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by following and observing union representatives as they proceeded to meet with bargaining unit members to discuss union business;

(c) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by taking pictures of union representatives as they meet with bargaining unit members to discuss union business;

(d) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by observing and or taking pictures of them as they proceeded to meet with union representatives to discuss union business;

(e) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by observing and or taking pictures of them as they participated in a collective demonstration outside the front of the Hotel;

(f) Interrogating employees regarding their union activity;

(g) Threatening employees with termination for going on strike;

5 (h) Making a statement of futility regarding union representation;

(i) Informing employees that their wages and/or benefits were reduced because of the Union;

10 (j) Prohibiting employees from speaking with each other regarding their terms and conditions of employment;

(k) Offering to give bargaining unit employees money so that they would investigate the Union;

15 (l) Soliciting employee complaints and grievances, and promising employees increased benefits and improved terms and conditions of employment if they were to renounce the Union;

(m) Threatening employees with adverse consequences because of their union activity;

20 (n) Telling employees to prepare a letter to the Union renouncing their support of the Union; and

25 (o) Threatening kitchen employees with discipline for refusing to sign a memo regarding an unlawfully instituted lunch break policy.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

30 7. The Respondent has not violated the Act except as set forth above.

### **Remedy**

35 Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall order the Respondent to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit and, if requested by the Union, to rescind any unilateral changes in wages, benefits, and conditions of employment implemented on February 1, 2007, and thereafter. I shall order the Respondent to

40 make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's unilateral implementation of new terms

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50

and conditions of employment in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6<sup>th</sup> Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>49</sup>

5 Further, because of the Respondent's failure to make required payments into the Funds, unit employees and former unit employees may have incurred out of pocket medical bills, which they would not have otherwise incurred. Therefore, I shall order the Respondent to reimburse and make whole unit employees and former unit employees for any such expenses.

10 Finally, the Respondent shall be required to post a notice in English and Spanish that assures its employees that it will respect their rights under the Act. Because of the pervasive nature of the Respondent's unfair labor practices, I hereby also grant the General Counsel's request to have a management representative read the notice in the presence of employees on work time, or be present while a Board agent reads the notice in English, and simultaneously be  
15 translated into Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>50</sup>

### ORDER

20 The Respondent, Majestic Towers, Inc. d/b/a Wilshire Plaza Hotel, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

25 (a) Unilaterally implementing changes in the terms and conditions of employment of the bargaining unit employees as provided for in the expired collective-bargaining agreement (the Agreement) without prior notice to, and bargaining in good faith with, the Union to an agreement or lawful impasse concerning any proposed changes;

30 \_\_\_\_\_  
<sup>49</sup> In her post-hearing brief, counsel for the General Counsel argues that the interest on any monetary award should be compounded on a quarterly basis. Counsel goes on at considerable length to explain why it is the General Counsel's view that computing compound interest, rather than simple interest, is the only manner by which to make discriminatees fully whole and carry  
35 out the purposes of the Act. Of course, replacing the current practice of awarding only simple interest on backpay and other monetary awards with compound interest will require a decision by the Board. One way of placing this issue before the Board is to have it raised and fully litigated at the Administrative Law Judge level. However, that has not happened in this case.

40 The General Counsel did not raise this issue in either of the two complaints, nor did the General Counsel advise the Respondent at the hearing that it was going to seek such a remedy. As a result, the Respondent would have been unaware that the General Counsel was seeking a change in the current practice of awarding only simple interest. Being unaware, counsel for the Respondent did not discuss this issue or even take a position in his post-hearing brief. Therefore, this matter has not been fully litigated, and for the undersigned to now award  
45 compound interest would constitute a denial of due process to the Respondent.

Accordingly, I decline to award compound interest on any backpay and other monetary awards pursuant to this decision.

50 <sup>50</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Failing to deduct monthly union dues and to remit those dues, along with related union dues information, to the Union;

5 (c) Failing to make the required contributions to the Health and Welfare and Retirement Funds, along with related contribution reports, as provided for in the Agreement between the Employer and the Union;

10 (d) Failing to process a grievance filed under the terms of the Agreement between the Employer and the Union by refusing to furnish the Union with requested written information necessary to support the grievance;

15 (e) Denying the Union's agents access to the Hotel as provided for the Agreement between the Employer and the Union by threatening to call the police, by summoning the police, or by orally revoking access;

20 (f) Failing to furnish the Union with requested information necessary for the Union's performance of its collective-bargaining duties including: detailed calculations of the cost of the Employer's economic proposals made during negotiations, information concerning the lawsuit instituted by Radisson Hotels International against the Employer, information concerning the differences in the wage rates between the housekeeping and cook classifications, and a list of all unit employees, their names, job titles, and wage rates;

25 (g) Failing to pay the unit employees their vacation pay as provided for in the Agreement between the Employer and the Union;

(h) Prematurely declaring that the parties were at an impasse in their collective-bargaining negotiations;

30 (i) Unilaterally abrogating the terms and conditions of employment under which its bargaining unit employees had been employed pursuant to the terms of the expired Agreement between the Employer and the Union;

35 (j) Unilaterally implementing, and without the parties having reached impasse, the proposals contained in the Employer's so called last, best, and final offer;

(k) Unilaterally eliminating the daytime shift in the lobby bar;

40 (l) Unilaterally implementing an employee locker inspection policy;

(m) Unilaterally implementing a kitchen employees' lunch break policy;

45 (n) Dealing directly with bargaining unit employees and, thereby, bypassing the Union, as the collective-bargaining representative of those employees;

(o) Informing employees, orally or in writing, that they were selected for random locker inspections and by subsequently performing said inspections;

50 (p) Informing kitchen employees, orally or in writing, of a change in their lunch break policy, and by threatening them with discipline for refusing to sign a copy of the new policy;

(q) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by following and observing union representatives as they walked through the Hotel in an effort to contact members of the bargaining unit;

5 (r) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by following and observing union representatives as they proceed to meet with bargaining unit members to discuss union business;

10 (s) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by taking pictures of union representatives as they as they meet with bargaining unit members to discuss union business;

15 (t) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by observing and taking pictures of them as they proceed to meet with union representatives to discuss union business;

20 (u) Engaging in surveillance and/or creating the impression of surveillance of bargaining unit employees by observing and taking pictures of them as they participated in a collective demonstration outside the front of the Hotel;

(v) Interrogating employees regarding their union activity;

(w) Threatening employees with termination for going on strike;

25 (x) Making a statement of futility regarding union representation;

(y) Informing employees that their wages and/or benefits were reduced because of the Union;

30 (z) Prohibiting employees from speaking with each other regarding their terms and conditions of employment;

(aa) Offering to give bargaining unit employees money so that they would investigate the Union;

35 (bb) Soliciting employee complaints and grievances, and promising employees increased benefits and improved terms and conditions of employment if they were to renounce the Union;

40 (cc) Threatening employees with adverse consequences because of their union activity;

(dd) Telling employees to prepare a letter to the Union renouncing their support of the Union; and

45 (ee) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

50

(a) Upon request of the Union, rescind any and all changes to unit employees' terms and conditions of employment implemented during and after February 1, 2007 and maintain the previous terms and conditions unless and until the parties bargain in good faith to an agreement or lawful impasse concerning any proposed changes thereto;

5

(b) Upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the Employer's unit employees concerning their wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody the agreement in a written, signed agreement;

10

(c) Provide the Union with requested information which is relevant and necessary to carrying out its collective-bargaining responsibilities, including fulfilling all outstanding Union requests for such information;

15

(d) Timely submit to the Union all monthly dues that the Employer has deducted from its employees' paychecks, and the monthly lists of employees who have paid union dues;

(e) Resume timely payments and restore retroactive payments to the Funds, and provide all required monthly contribution reports to the Funds, as set forth in the expired collective-bargaining agreement (the Agreement).

20

(f) Reimburse any bargaining unit employees who incurred out of pocket medical expenses by virtue of the Employer's unlawful discontinuation of contributions to the Funds;

25

(g) Restore its past policy and practice of giving union representatives access to its employees at the Hotel;

(h) Meet and bargain in good faith with the Union over any proposed changes in wages, hours, and working conditions of its employees before the Employer puts such changes into effect;

30

(i) Upon the request of the Union, rescind its changed employee random locker search policy;

35

(j) Upon the request of the Union, process the grievance filed by the Union on September 25, 2006, regarding the Employer's failure to make the contractually required contributions to the Funds, and provide the Union with the information it requested on September 25, 2006, related to that grievance;

40

(k) Provide information concerning the Employer's housekeeping and cook positions in response to the Union's February 12, 2007, request;

(l) Provide information concerning the Employer's cost-savings calculations for its economic bargaining proposals in response to the Union's January 16, 2007, oral request and its January 25, 2007, written request;

45

(m) Provide information about the lawsuit filed by the Radisson Hotel against the Employer, in response to the Union's January 30, 2007, oral and written request;

50

(n) Make whole any unit employees who were deprived of vacation pay when they took their accrued vacations under the terms of the expired Agreement between the parties;



(o) Upon request of the Union, rescind the February 14, 2007, memorandum changing its kitchen employees' lunch break policy;

(p) Upon the request of the Union, restore the day shift lobby bar, and, also, make whole any unit employees whose hours of employment and other benefits were reduced by elimination of that shift, and reinstate any employee laid off as a result of that elimination;

(q) Within 14 days of this Order, remove from its files any photographs or videotapes of employees speaking with union representatives or engaging in peaceful union or other protected concerted activity, and any photographs or videotapes of employees picketing in front of the Hotel;

(r) Within 14 days after service by the Region, post at its hotel in Los Angeles, California, copies of the attached notice marked "Appendix,"<sup>51</sup> in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Further, a management representative shall read the notice in the presence of employees on work time, or be present while a Board agent reads the notice in English, and simultaneously be translated into Spanish. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2006; and

(s) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by Region 31 attesting to the steps the Respondent has taken to comply.

Dated at Washington, D.C., April 7, 2008

\_\_\_\_\_  
Gregory Z. Meyerson  
Administrative Law Judge

<sup>51</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT refuse to bargain collectively by unilaterally implementing on February 1, 2007, our final contract offer made to Unite Here! Local 11, Unite Here International Union (the Union).

WE WILL NOT unilaterally implement changes in the terms and conditions of your employment as provided for in the expired collective-bargaining agreement (the Agreement) with the Union.

WE WILL NOT fail to make contributions to the Health and Welfare and Retirement Funds, along with related contribution reports, as provided for in the expired Agreement.

WE WILL NOT fail to process grievances filed under the terms of the Agreement by refusing to furnish the Union with requested information necessary to support grievances.

WE WILL NOT deny the Union's agents access to the Hotel as provided for in the Agreement by summoning the police, by threatening to do so, or by revoking access.

WE WILL NOT fail to furnish the Union with requested information necessary for the Union's performance of its collective-bargaining duties.

WE WILL NOT unilaterally eliminate the daytime shift in the lobby bar.

WE WILL NOT unilaterally implement an employee locker inspection policy.

WE WILL NOT unilaterally implement a kitchen employees' lunch break policy.

WE WILL NOT bargain directly with you, thereby, bypassing the Union as your collective-bargaining representative.

WE WILL NOT engage in surveillance by observing, photographing, or video taping you as you meet with other employees and with union representatives to discuss union business.

WE WILL NOT engage in surveillance by observing, photographing, or video taping you as you participate in a collective demonstration in front of the Hotel.

WE WILL NOT interrogate you regarding your union activity.

WE WILL NOT threaten you with termination for going on strike.

WE WILL NOT make statements to you designed to convince you of the futility of representation by the Union.

WE WILL NOT inform you that the reason your wages and benefits were reduced was because the Union represents you.

WE WILL NOT prohibit you from speaking with fellow employees about your wages, hours, working conditions, or other terms and conditions of employment.

WE WILL NOT offer to pay you a sum of money to investigate the Union.

WE WILL NOT solicit complaints and grievances from you and promise to improve your terms and conditions of employment if you will renounce the Union.

WE WILL NOT threaten you with discipline for refusing to sign a memo regarding an unlawfully instituted lunch break policy.

WE WILL NOT threaten you with an adverse consequence because of your union activity.

WE WILL NOT tell you to submit a letter to the Union renouncing your support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

Included: All full-time and regular part-time cooks, pantry employees, dishwashers, deli attendants, waiters, bussers, room service employees, banquet employees, bartenders, restaurant cashiers, stewarding department employees, housekeeping department employees, laundry attendants, front office attendants, PBX attendants, reservation agents, bell attendants, and others listed in Schedule A in the expired Agreement.

Excluded: Office clerical employees, all other employees, guards and supervisors as defined in the Act.

WE WILL, upon request by the Union, rescind any unilateral changes that we have implemented in your terms and conditions of employment.

WE WILL make whole any of you who were adversely affected by the unilateral changes that we implemented, with interest.

WE WILL provide the Union with requested information which is relevant and necessary to carry out its collective-bargaining responsibilities, including fulfilling all outstanding Union requests for such information.

WE WILL submit to the Union all monthly dues that we have deducted from your paychecks, and the monthly list of employees who have paid union dues.

WE WILL resume timely payments and restore retroactive payments to the Health and Welfare and Retirement Funds, and provide all required monthly contribution reports to the Funds, as set forth in the expired Agreement.

WE WILL reimburse any of you who incurred out of pocket medical expenses by virtue of our discontinuation of contributions to the Funds.

WE WILL process all grievances previously filed under the terms of the expired Agreement, and furnish the Union with requested written information necessary to support the grievances.

WE WILL permit the Union's agents access to the Hotel as provided for in the expired Agreement.

WE WILL pay you for your accrued vacation time as provided for in the expired Agreement.

WE WILL reinstate the daytime shift in the lobby bar, and make whole any of you who were adversely affected by the unilateral elimination of that shift, with interest; and reinstate any employee laid off as a result of that elimination.

WE WILL within 14 days from the date of the Board's Order, remove from our files any photographs or videotapes of you speaking with union representatives or engaging in peaceful union or other protected concerted activity, and any photographs or videotapes of you picketing in front of the Hotel.

Majestic Towers, Inc. d/b/a Wilshire Plaza Hotel

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

11150 West Olympic Boulevard, Suite 700

Los Angeles, California 90064-1824

Hours: 8:30 a.m. to 5 p.m.

310-235-7352

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7123.

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES

**MAJESTIC TOWERS, INC.  
d/b/a WILSHIRE PLAZA HOTEL**

**and**

**Cases 31-CA-28135  
31-CA-28144  
31-CA-28196  
31-CA-28247  
31-CA-28248  
31-CA-28249  
31-CA-28250  
31-CA-28257  
31-CA-28487  
31-CA-28490**

**UNITE HERE LOCAL 11,  
UNITE HERE! INTERNATIONAL UNION**

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and Case 31-CA-28143

THE LOS ANGELES HOTEL-RESTAURANT  
EMPLOYER-UNION WELFARE FUND, THE LOS  
ANGELES HOTEL-RESTAURANT EMPLOYER-UNION  
RETIREMENT FUND AND THE LEGAL FUND OF  
HOTEL AND RESTAURANT EMPLOYEES OF LOS ANGELES

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